Supreme Court, U.S.
FILED

(1)

No. 95 1127 JAN 16 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

TRI-COUNTY INDUSTRIES, INC.,

Petitioner,

vs.

COUNTY OF MERCER, PENNSYLVANIA; MERCER COUNTY SOLID WASTE AUTHORITY; and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS W. KING, III
Counsel of Record
THOMAS J. MAY
MICHAEL D. HNATH
DILLON McCANDLESS KING
COULTER & GRAHAM L.L.P.
Attorneys for Petitioner
128 West Cunningham Street
Butler, Pennsylvania 16001
(412) 283-2200

6450
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

87 PP

QUESTIONS PRESENTED

1. Does the Mercer County flow control ordinance, Ordinance No. 6-1991, violate the Commerce Clause of the United States Constitution in light of the analysis recently set forth by the United States Supreme Court in *C & A Carbone, Inc. v. Town of Clarkstown*, __ U.S. __, 114 S. Ct. 1677 (1994)?

2. Did the United States Court of Appeals for the Third Circuit commit an error of law in promulgating a new test for determining whether a local flow control ordinance violates the Commerce Clause?

3. Do the decisions of the United States Court of Appeals for the Third Circuit in *Harvey & Harvey, Inc. v. County of Chester, et al.*, 68 F.3d 788 (3rd Cir. 1995) and the United States Court of Appeals for the Second Circuit in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995), create an intercircuit conflict?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. Pennsylvania's Municipal Waste Planning, Recycling and Waste Reduction Act and Mercer County Ordinance No. 6-1991	2
B. Proceedings Below	4
Reasons for Granting the Writ	6
Summary	6
I. The Court of Appeals' application of the three-part test is inconsistent with *Carbone*.	7
II. The Court of Appeals' decision in *Harvey* creates an intercircuit conflict with the decision of the Court of Appeals for the Second Circuit in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995)	12

Contents

Page

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 48 F.3d 701 (3rd Cir. 1995) 9, 10, 11

C&A Carbone, Inc. v. Town of Clarkstown, __ U.S. __, 114 S. Ct. 1677 (1994) ..... i, 5, 6, 7, 8, 9, 11, 13, 14

Harvey & Harvey, Inc. v. County of Chester, et al., 68 F.3d 788 (3rd Cir. 1995) ..... i, 1, 2, 5, 6, 7, 8, 9, 11, 14

J. Filiberto Sanitation v. Department of Envtl. Protection, 857 F.2d 913 (3rd Cir. 1988) 4

New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 108 S. Ct. 1803 (1988) 8

Oregon Waste Systems, Inc. v. Department of Environmental Quality, __ U.S. __, 114 S. Ct. 1345 (1994) 8

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 11

SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2nd Cir. 1995) ..... i, 6, 12, 13

Contents

Page

Thurston Motor Lines, Inc. v. Jordon K. Rand, Ltd., 460 U.S. 533 (1983) 9

Statutes Cited:

28 U.S.C. § 1254(1) 1

53 P.S. §§ 4000.101 *et seq.* 2

53 P.S. § 4000.501(a) 2

53 P.S. § 4000.502(b) and (d) 2

United States Constitution Cited:

U.S. Const. Art. I, § 8, cl. 3 ..... i, 1, 4, 5, 6, 8, 11, 13, 14

Other Authorities Cited:

Mercer County Ordinance No. 6-1991, Section 3 .... i, 1, 2, 3, 4, 13

Smithtown Code § 177-17(B) (1994) 13

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Third Circuit Dated November 21, 1995 ..... 1a

Contents

Page

Appendix B — Opinion of the United States Court of Appeals for the Third Circuit Dated October 20, 1995 ..... 3a

Appendix C — Opinion and Order of the United States District Court for the Western District of Pennsylvania Dated October 12, 1994 ..... 55a

Tri-County Industries, Inc., respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in No. 94-3622.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, *infra*, 3a-54a) is reported at *Harvey & Harvey, Inc. v. County of Chester, et al.*, 68 F.3d 788 (3rd Cir. 1995). The opinion of the district court (App. C, *infra*, 55a-66a) is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered its original judgment at No. 94-3622 on October 20, 1995. On November 21, 1995, the Court of Appeals denied a timely Petition for Rehearing (App. A, *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part: "[t]he Congress shall have the power . . . to regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3.

Mercer County Ordinance No. 6-1991, Section 3 provides:

> Section 3. *Waste Flow Control*
>
> All Municipal Waste shall be transported to and delivered to the Facility designated by MCSWA from time to time. No person shall transport or deliver, or cause to be transported

other than the MCSWA Designated Facility unless such transport or delivery is expressly provided for in the Plan and the MCSWA Rules and Regulations.

STATEMENT OF THE CASE

Petitioner, Tri-County Industries, Inc. (hereinafter "Tri-County"), is a hauler of residential and commercial solid waste in Western Pennsylvania and Ohio.

A. Pennsylvania's Municipal Waste Planning, Recycling and Waste Reduction Act and Mercer County Ordinance No. 6-1991

The Municipal Waste Planning, Recycling and Waste Reduction Act (the "Act"), Act of July 28, 1988, P.L. 556, §§ 101 *et seq.*, 53 P.S. §§ 4000.101 *et seq.*, was adopted in 1988 and requires each county to prepare and submit a waste management plan to the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DER") for approval. 53 P.S. § 4000.501(a). Under the Act, a plan is required to assure sufficient processing and disposable capacity of each county's waste for at least ten (10) years. 53 P.S. § 4000.502(b) and (d). As noted in the opinion of the Court of Appeals, "If a county chooses to require that municipal waste be processed or disposed of at designated facilities by means other than by contract (*e.g.*, by ordinance), the plan must explain the basis for such a proposal and include a copy of the proposed flow control ordinance or other legal instrument." 68 F.3d at 793.

In late 1989, Respondent Mercer County formed the Mercer County Solid Waste Authority ("MCSWA") to implement the county's duties under the Act. The MCSWA retained the services of an independent consultant, Camp, Dresser & McKee, Inc., to assist in the development of its solid waste management plan. The

MCSWA prepared bid specifications contained in the Request for Proposals ("RFP") with the objective of selecting a single site as the location for all of the County's waste disposal and processing needs. The RFP was obtained by 23 companies located both within and outside the Commonwealth; however, only four (4) solid waste management companies within the Commonwealth, including Tri-County, submitted a bid in response to the RFP.

After a review of the four (4) submitted proposals, the MCSWA accepted the recommendation of its consultant and chose the proposal submitted by Waste Management of Pennsylvania, Inc. ("Waste Management"), the owner of the Northwest Sanitary Landfill located in neighboring Butler County. The plan was submitted to the DER in the fall of 1990 and approved in March 6, 1991. On March 7, 1991, the MCSWA entered into a contract with Waste Management to provide for the disposal of Mercer County waste at the Northwest Sanitary Landfill for a ten-year period and Mercer County adopted Ordinance No. 6-1991.

Section 3 of Ordinance No. 6-1991 provides:

> Section 3. *Waste Flow Control*
>
> All Municipal Waste shall be transported to and delivered to the Facility designated by MCSWA from time to time. No person shall transport or deliver, or cause to be transported or delivered, Municipal Waste to a Facility other than the MCSWA Designated Facility unless such transport or delivery is expressly provided for in the Plan and the MCSWA Rules and Regulations.

The Ordinance and regulations promulgated thereunder require each hauler of Mercer County waste to obtain a hauling license and

each hauler of Mercer County waste to obtain a hauling license and to haul all municipal waste generated in Mercer County to the designated Northwest Sanitary Landfill and pay the $35.00 per ton "tipping fee."[1] After the enactment of Ordinance No. 6-1991, Tri-County continued to haul waste to two other facilities, the American Waste Landfill in Ohio and the Carbon Limestone Landfill in Poland, Ohio, which charged tipping fees of $17.20 and $27.95 per ton, respectively.

By letter dated March 19, 1993, the MCSWA notified Tri-County that a hearing was to be held to determine whether its hauling license should be revoked due to its transportation of waste to these non-designated sites. At the time this letter was sent to Tri-County, it was hauling between 600 and 900 tons a month of Mercer County waste and hauled 500 tons per month to the Ohio sites.

B. Proceedings Below

In response to the letter of March 19, 1993, Tri-County filed a Complaint for Declaratory Judgment and Permanent Injunction in the United States District Court for the Western District of Pennsylvania, Civil Action No. 93-592, against the County of Mercer, Pennsylvania, and the Mercer County Solid Waste Authority. Tri-County alleged that the Mercer County flow control ordinance, Ordinance No. 6-1991, was in violation of the Commerce Clause of the United States Constitution. On May 6, 1993, the district court granted the motion to intervene filed by the DER.

On April 29, 1993, and May 5, 1993, the district court held

---

1. "Tipping fees" are the rates that a disposal facility or transfer station charges a hauler which deposits waste at its site. *J. Filiberto Sanitation v. Department of Envtl. Protection*, 857 F.2d 913, 916 (3rd Cir. 1988).

hearings on Tri-County's motion for preliminary injunctive relief. At the conclusion of the hearings, the district court denied the motion by adjudication dated May 25, 1993. Tri-County appealed this denial, but subsequently withdrew the appeal by stipulation. Prior to the trial on the merits, the parties filed, on December 13, 1993, a Joint Motion to Enter Judgment based on the evidence before the district court and the joint stipulation of facts attached to the Motion.

On October 12, 1994, the district court granted the relief requested by Tri-County. By an opinion and order dated October 12, 1994 (App. C, *infra,* 55a-65a), the district court declared that the Mercer County flow control ordinance was invalid under the Commerce Clause of the United States Constitution in accordance with the analysis recently set forth by the United States Supreme Court in *C & A Carbone, Inc. v. Town of Clarkstown,* __ *U. S.* __, 114 S. Ct. 1677 (1994) (hereinafter *"Carbone"*). The district court therefore enjoined the Respondents from revoking Tri-County's hauling license, from prohibiting the transportation of solid waste out of the Commonwealth, and from enforcing Ordinance No. 6-1991.

The Respondents then filed an appeal from the district court's determination to the United States Court of Appeals for the Third Circuit. That appeal, No. 94-3622, was consolidated for argument with an appeal *(Harvey & Harvey, Inc. v. County of Chester, et al.,* No. 94-1924) from the United States District for the Eastern District of Pennsylvania. The Court of Appeals vacated the order of the district court in No. 94-3622, and remanded the matter for further proceedings consistent with its opinion. *See Harvey & Harvey, Inc. v. County of Chester, et al.,* 68 F.3d 788 (3rd Cir. October 20, 1995) (hereinafter *"Harvey"*). (App. B, *infra,* 3a-54a). Tri-County filed a Petition for Rehearing which was denied by the Court of Appeals on November 21, 1995. (App. A, *infra,* 1a-2a).

REASONS FOR GRANTING THE WRIT

SUMMARY

The judgment of the panel of the Court of Appeals in No. 94-3622 should be reviewed because it sets forth a test which is inconsistent with the decision of the United States Supreme Court in *Carbone*. Specifically, the panel decision is inconsistent with *Carbone* in that it inserts a new test and an additional burden on challengers to municipal flow control ordinances which designate an in-state site for the disposal of all of its solid waste. Such a test is not required by, and is in fact contrary to, the teaching of *Carbone*. This additional showing is comprised of a three-part test to determine whether a flow control ordinance "actually discriminates" against interstate commerce, thereby triggering strict scrutiny analysis to be undertaken by the district court in its determination whether the ordinance violates the Commerce Clause.

The three-part test announced by the panel opinion requires that the district court "closely examine: (1) the designation process; (2) the duration of the designation; and (3) the likelihood of an amendment to add alternative sites, for signs that out-of-state bidders do not in practice enjoy equal access to the local market." *Harvey*, 68 F.3d at 801.

In addition, the decision of the Court of Appeals for the Third Circuit in *Harvey* creates a conflict with the decision of the United States Court of Appeals for the Second Circuit in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995).[2]

---

2. As of January 1, 1996, the parties in *SSC Corp.* have filed cross-petitions for writs of certiorari. The petition of SSC Corp. (95-782) was filed on November 20, 1995, *see* 64 USLW 3380, and the cross-petition of Smithtown (No. 95-1015) was filed on December 20, 1995.

I.

THE COURT OF APPEALS' APPLICATION OF THE THREE-PART TEST IS INCONSISTENT WITH *CARBONE*.

The rationale for the majority opinion of Court of Appeals and the articulation of the three-part test is clearly stated in the following excerpt from its opinion:

> These precepts are fully consistent with the precedents in this area. While *Carbone* clearly has broad application, it did not establish a *per se* rule subjecting all flow control ordinances to strict scrutiny. The Court's discussion [in *Carbone*] reveals that its decision was not based on the fact that the waste was required to be processed at a single plant .... And in interpreting *Carbone*, this Court has focused on the *process* of selecting waste service providers rather than on the effect of the regulation once a provider has been chosen. *See Atlantic Coast*, 48 F.3d at 713. That a flow control ordinance requires all waste to be processed or deposited in state for some period of time, therefore, does not necessarily violate the dormant Commerce Clause unless out-of-state businesses did not compete on an even playing field for the designation.

Harvey, 68 F.3d at 801-802. (emphasis added). The majority opinion of the Court of Appeals further noted, "Admittedly, *we cannot cite any authority* for the sort of inquiry we will describe, but this area of law is nascent, and we are constrained to draw upon notions of reasonableness to effectuate the relevant policies." *Id.* at 802 (emphasis added).

Tri-County respectfully suggests that the approach articulated by the majority opinion is clearly inconsistent with *Carbone* and erroneously requires a "focus on the process" by which a site is designated by a flow control ordinance. While Tri-County agrees with the majority opinion's statement that *Carbone* did not establish a *per se* rule subjecting *all* flow control ordinances to strict scrutiny, *Carbone* most clearly compels that a municipality's flow control ordinance which designates a single site within the county or state for the disposal of all solid waste generated within its borders is facially discriminatory and must be subjected to heightened or strict scrutiny.[3]

In his dissent from the panel opinion, Circuit Judge Nygaard noted that discriminatory purpose *or* effect triggers heightened or strict scrutiny and that, "[i]n *Carbone*, the Supreme Court held that a flow control ordinance coupled with a designation discriminated in its effect . . . ." *Harvey*, 68 F.3d at 810 (Nygaard, J., dissenting). Circuit Judge Nygaard correctly went on to add: "As the holding of the Supreme Court in *Carbone* compels, the *Tri-County* district court applied the heightened scrutiny test upon finding that the Mercer County ordinance was discriminatory in its practical effect." *Id.* at 811.

Most importantly, in *Carbone*, the Supreme Court did not engage in an analysis of the process by which the Clarkstown facility was selected. *Id.* at 810, n.1. In light of this clear direction from the Supreme Court, the imposition of the additional three-part obstacle implicitly overrules the holding of *Carbone*. The Courts of

---

3. Where a local law is considered to facially discriminate against interstate commerce, it will not offend the Commerce Clause if it can be shown "that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory means." *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, __ U.S. __, __, 114 S. Ct. 1345, 1351 (1994) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 1810 (1988).

Appeal have no authority to implicitly or explicitly overrule a precedent of the Supreme Court. *Thurston Motor Lines, Inc. v. Cordon K. Rand, Ltd.*, 460 U.S. 533 (1983).

In sum, the majority opinion of the Court of Appeals, despite its acknowledgement "that *Carbone* and the entire line of recent Supreme Court cases have clarified that either [a discriminatory] purpose or effect will trigger strict scrutiny analysis," *see Harvey*, 68 F.3d at 798, nevertheless articulates the new test referenced above which focuses on the landfill or site designation process. This focus on the designation process erroneously concentrates the inquiry away from the practical effect of the designation of a single site. In addition, the focus on process arguably is more relevant to a determination whether the ordinance has a discriminatory purpose.

The Court of Appeals derived its articulated test from its reading of its earlier decision in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3rd Cir. 1995) (hereinafter *"Atlantic Coast"*). The panel opinion noted, "In interpreting *Carbone*, therefore, *Atlantic Coast* did not consider all flow control ordinances to be *per se* discriminatory (and consequently subject to strict scrutiny analysis). Instead, we focused on the process and invalidated a scheme in which the process discriminated against out-of-state facilities." *Harvey*, 68 F.3d at 801. This reading of *Atlantic* Coast is inaccurate.

First, in *Atlantic Coast*, the scheme was not invalidated but rather the matter was remanded for further determination. Second, and more importantly, in *Atlantic Coast*, the Court of Appeals held that "New Jersey's waste flow regulations, in effect *and* by design, discriminate against interstate commerce and that heightened scrutiny under the dormant Commerce Clause is required." 48 F.3d at 710 (emphasis added). This is completely in accord with the *Carbone* holding that either a discriminatory effect *or* purpose

subjects a flow control ordinance to strict scrutiny. The *Atlantic Coast* panel simply held that the New Jersey ordinance failed both prongs of a disjunctive test. In other words, the conclusions of discrimination both in effect and in design (*i. e.*, purpose) should be viewed as alternative findings, either of which would compel the application of strict scrutiny.

Both the explicit language and structure of the opinion in *Atlantic Coast* demonstrate that it is not necessary that the process of selection be discriminatory in order to trigger strict scrutiny. In Section III, part B of the panel opinion *Atlantic Coast*, the Court of Appeals stated in relevant part:

> New Jersey's flow control regulations accomplish on a district level what Clarkstown's flow control ordinance accomplished on a local level. They favor the district's designated facilities at the expense of out-of-state providers of processing and disposal services that would otherwise compete for the opportunity to service solid waste generated within the district. . . . New Jersey is regulating the market for solid waste processing and disposal services . . . by directing that consumers . . . utilize a favored provider. . . . *It necessarily follows,* we conclude, that any Commerce Clause analysis of New Jersey's flow control regulations must employ the heightened scrutiny test.

Id. at 712-13 (emphasis added). Thus, the finding of a practical discriminatory effect itself required strict scrutiny analysis -and the Court of Appeals did not hold that a discriminatory purpose must also be established. Simply, "[because the waste flow regulations discriminate against interstate commerce by restricting the access

of out-of-state facilities to waste processing and disposal service markets, they can be upheld only if they survive the heightened scrutiny required by *C & A Carbone." Id.* at 718.

In the discussion in the following portion of the opinion in *Atlantic Coast,* Section III, part C, the Court of Appeals discussed "the process" only in response to the state's argument that, because its scheme does not pose an absolute bar to out-of-state facilities becoming designated facilities, no Commerce Clause violation should be found. *Id.* at 713. Also in support of its requirement that the focus be on the designation process, the majority opinion in *Harvey* stressed that, in *Atlantic Coast,* it "rejected the attempt to frame the issue as one of the constitutionality of the statute after the designation was made. . . . " *Harvey,* 68 F.3d at 800. Here, it quoted extensively from Section III, part C, of the *Atlantic Coast* opinion (48 F.3d at 715), which concerned New Jersey's argument that the public utility aspects of its scheme[4] distinguished its case from *Carbone* and required the application of the less-stringent balancing test set forth in *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970). This portion of the *Atlantic Coast* opinion was ancillary to its earlierstated holding.

Like Tri-County here, Atlantic Coast Demolition & Recycling, Inc., sought in its complaint a declaration that the waste plans identified in the flow control ordinance violate the Commerce Clause and a permanent injunction prohibiting the defendants from interfering with its transportation of debris to facilities outside the state. *Atlantic Coast,* 48 F.3d at 709. In particular, Atlantic Coast Demolition focused on the requirement that waste loads be returned to each district's designated facility. *Id.* Thus, both *Carbone* and *Atlantic Coast* compel that the Court of Appeals should have upheld the application of the heightened scrutiny test upon the

4. The Respondents in this case initially argued the public utility/market participant doctrine before the district court but later withdrew the argument.

correct finding of the district court that the Mercer County Ordinance was discriminatory in its practical effect.

II.

THE COURT OF APPEALS' DECISION IN *HARVEY* CREATES AN INTERCIRCUIT CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN *SSC CORP. v. TOWN OF SMITHTOWN*, 66 F.3d 502 (2nd Cir. 1995).

The Court of Appeals for the Third Circuit's decision in *Harvey* creates a conflict with the decision of the Court of Appeals for the Second Circuit in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995) (hereinafter *"SSC Corp."*). In *SSC Corp.*, the Court of Appeals considered a challenge to the flow control ordinance enacted by the Town of Smithtown, a municipality located in northwestern Suffolk County on Long Island, New York. In the mid-1980s, Smithtown had negotiated with the neighboring town of Huntington to provide joint waste disposal services for their residents. The towns entered into a municipal agreement to share Smithtown's existing landfill and Huntington's incinerator whose construction was underway but incomplete at the time of the agreement. To ensure a steady flow of waste to the Huntington incinerator, Smithtown enacted a flow control ordinance in 1991. *See* 66 F.3d at 506-07.

The Smithtown flow control ordinance provided:

> No person authorized to collect or transport acceptable waste within the Town of Smithtown shall dispose of acceptable waste generated within the Town of Smithtown except at a solid waste management facility designated by the Town Board pursuant to this section.

Smithtown Code § 177-17(B) (1994). *Id.* The Town Board designated the Huntington incinerator as the disposal site for garbage generated in the town. The town divided its residential areas into ten improvement districts and solicited competitive bids for waste collection in the districts. Smithtown awarded seven of the ten districts to SSC Corp., which began collection in January 1992. *Id.* at 507-08.

After Smithtown accused it of transporting waste to sites other that the Huntington incinerator and withheld contract payments from it, SSC Corp. filed an action in the United States District Court for the Eastern District of New York and sought to enjoin Smithtown from enforcing both the flow control ordinance and the contractual provisions which required that it deliver all garbage to the Huntington incinerator. *Id.* at 508. SSC Corp. claimed that the ordinance and the contractual provisions violated the Commerce Clause. The district court granted summary judgment for SSC Corp. and invalidated both the ordinance and contract[5] between Smithtown and SSC Corp. under the Commerce Clause, relying on *Carbone*. *Id*. at 505. Smithtown appealed.

The Court of Appeals for the Second Circuit held that "*Carbone compels* us to find that Smithtown's flow control ordinance facially discriminates against interstate commerce because it directs all town waste to a single local disposal facility, to the exclusion of both in-state and out-of-state competitors." *SSC Corp.*, 66 F. 3d at 514 (emphasis added). Accordingly, the Court of Appeals noted that Smithtown had to "demonstrate, under rigorous scrutiny that it has no other means [than its flow control ordinance] to advance a legitimate local interest." *Id.* Because Smithtown was unable to so demonstrate, the Court of Appeals found that the ordinance violated the Commerce Clause. *Id.*

---

5. Because Tri-County has challenged only Mercer County Ordinance No. 6-1991, the ensuing discussion is limited to the holding of the Court of Appeals for the Second Circuit regarding the flow control ordinance enacted by Smithtown.

Clearly, the ordinances enacted by Smithtown, at issue in *SSC* Corp., and enacted by Mercer County, at issue in *Harvey*, are substantially similar in that both restrict the delivery or transportation of waste to sites other than those designated by the Town Board and MCSWA, respectively. The ordinance enacted by Clarkstown, at issue in *Carbone*, also shared this feature.

Unlike the Court of Appeals for the Third Circuit in *Harvey*, however, the Court of Appeals for the Second Circuit did not undertake to articulate a new test which focuses on the fairness of the designation process to determine whether the flow control ordinance must be subjected to strict scrutiny. Instead, it correctly held that, because it directed all waste to a designated site, the Smithtown ordinance facially discriminated against interstate commerce and required that it be subjected to strict scrutiny. Thus, it is not the fairness of the site designation process which is critical but rather the *effect* of designating a single site. The latter, under *Carbone*, results in a discriminatory effect against interstate commerce regardless of the fairness of the selection process.

It is apparent that a divergence of opinion exists regarding the import of this Court's decision in *Carbone* to challenges to municipal flow control ordinances under the dormant Commerce Clause. This Court should grant this Petition to resolve the conflict between the Courts of Appeal. For the reasons set forth above, Tri-County respectfully request that its Petition be granted and that the decision of the Court of Appeals for the Third Circuit in *Harvey* be vacated, thereby affirming the order of the district court in favor of Tri-County because the "[Respondents] failed to meet their burden of establishing the unavailability of nondiscriminatory alternatives." *Tri-County Industries, Inc. v. County of Mercer, et al.*, Civil Action No. 93-592, slip op. at 9-10 (W.D. Pa. Oct. 12, 1994) (App. C, *infra*, 64a).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS W. KING, III
Counsel of Record
THOMAS J. MAY
MICHAEL D. HNATH
DILLON McCANDLESS KING
COULTER & GRAHAM L.L.P.
Attorneys for Petitioner
128 West Cunningham Street
Butler, Pennsylvania 16001
(412) 283-2200

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 21, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-3622

TRI-COUNTY INDUSTRIES, INC.

v.

COUNTY OF MERCER PENNSYLVANIA; MERCER COUNTY SOLID WASTE AUTHORITY; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES

THE COUNTY OF MERCER, PENNSYLVANIA; THE MERCER COUNTY SOLID WASTE AUTHORITY; and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Appellants

(D.C. Civ. No. 93-cv-00592)

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and SAROKIN, *Circuit Judges*,

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellee having been

Appendix A

submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

s/ Edward R. Becker
Circuit Judge

DATED: NOV 21 1995

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 20, 1995

HARVEY & HARVEY, INC., Appellant

v.

COUNTY OF CHESTER; Pennsylvania Department of Environmental Resources; Chester County Solid Waste Authority; Southeastern Chester County Refuse Authority.

TRI-COUNTY INDUSTRIES, INC.

v.

COUNTY OF MERCER PENNSYLVANIA; Mercer County Solid Waste Authority; Commonwealth of Pennsylvania, Department of Environmental Resources; The County of Mercer, Pennsylvania; The Mercer County Solid Waste Authority; and Commonwealth of Pennsylvania, Department of Environmental Resources, Appellants.

Nos. 94-1924, 94-3622.

United States Court of Appeals,
Third Circuit.

Argued June 6, 1995.

Decided Oct. 20, 1995.

* * *

Appendix B

James McC. Geddes, (argued), Philip Trainer, Jr., Steven T. Margolin, Ashby & Geddes, Wilmington, DE, for Harvey & Harvey, Inc.

John S. Halsted, Thomas L. Whiteman, Office of County Solicitor, West Chester, PA, for County of Chester.

Dennis W. Strain, (argued), Mark L. Freed, Commonwealth of Pennsylvania Department of Environmental Resources, Conshohocken, PA, for Pennsylvania Department of Environmental Resources, appellee in No. 94-1924.

James E. McErlane, (argued), Lamb, Windle & McErlane, P.C., West Chester, PA, for Chester County Solid Waste Authority.

Joseph C. Crawford, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, PA, for Delaware County Solid Waste Authority, Amicus-Appellee in No. 94-1924.

Thomas J. May, (argued), Thomas W. King, III, Dillon McCandless & King, Butler, PA, Tri-County Industries, Inc.

Ronald D. Amrhein, Jr., William J. Madden, P.C., Sharon, PA, for Mercer County Solid Waste Authority and the County of Mercer.

Michael D. Buchwach, Pennsylvania Department of Environmental Resources, Office of General Counsel, Meadville, PA, Dennis W. Strain, (argued), Kristen M. Campfield, Gail B. Phelps, Pennsylvania Department of Environmental Resources, Office of Chief Counsel, Harrisburg, PA, for Commonwealth of Pennsylvania, Department of Environmental Resources, Appellant in No. 94-3622.

Appendix B

Before: BECKER, NYGAARD, and ALITO, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

These appeals, briefed separately but listed together for oral argument, both present Commerce Clause challenges to municipal "flow control" ordinances. These ordinances require waste haulers, like the plaintiffs in each case here, to bring solid waste picked up within the municipal boundaries to designated landfill sites located within a state. These designated sites, in turn, usually charge "tipping fees" considerably higher than other, nondesignated sites located nearby in other states. In each case we must determine whether these ordinances, which threaten haulers taking waste to nondesignated sites with fines and suspension, impermissibly discriminate against interstate commerce.

In one case Harvey & Harvey ("Harvey"), an interstate collector, hauler and processor of municipal solid waste, brought suit against Chester County, the Chester County Solid Waste Authority ("the Authority")[1] the Southeastern Chester County Refuse Authority ("SECCRA")[2] and the Pennsylvania Department of Environmental Resources (the "DER"). It seeks to have the County's flow control plan declared unconstitutional under the dormant Commerce Clause. The district court denied

---

1. The authority is a Pennsylvania municipal corporation established by the County Commissioners in 1984 for the purpose of operating the Lanchester Landfill.

2. SECCRA owns the SECCRA landfill.

Harvey's motion for a preliminary injunction. Concluding that the plan does not discriminate against interstate commerce, it held that the *Pike* balancing test, *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844; 25 L.Ed.2d 174 (1970), which Harvey acknowledged that it could not meet, would apply. (Sept. 8, 1994 Order.) Because the district court did not consider whether the Chester County flow control scheme offered out-of-state landfill operators an equal opportunity to compete for the county's waste disposal business, we vacate and remand for further proceedings.

In the other case Tri-County Industries, Inc. ("Tri-County"), a hauler of residential and commercial solid waste throughout Mercer County and in other Western Pennsylvania and Ohio counties, brought suit against the County of Mercer and the Mercer County Solid Waste Authority ("MCSWA"). It sought both a declaratory judgment that the county's flow control plan violated the dormant Commerce Clause and a permanent injunction enjoining its enforcement. The district court, concluding that the plan improperly impeded interstate commerce, granted final judgment on stipulated facts in favor of Tri-County. We hold that the district court erred in concentrating on the operation of the ordinance and concomitantly in failing to consider whether out-of-state interests competed on a level playing field. Therefore, the order in Tri-County must also be vacated and remanded.

I. FACTS AND PROCEDURAL HISTORY

A. THE SOLID WASTE CRISIS

During the 1970s and '80s, national environmental concerns fostered stricter state regulation of waste disposal. This regulation led to a large number of landfill closures throughout

the United States, creating shortages in many places and driving up landfill pricing. *See* Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow in the Post-Carbone World*, 22 FORDHAM URB. L.J. 361 n. 33 (1995); *see also Harvey* SA 382 (Kerns); James C. Vago, *Comment, The Uncertain Future of Flow Control Ordinances; The Last Trash to Clarkstown?*, 22 N.KY. L.REV. 93, 98 (1995). Pennsylvania was no exception. It too experienced inadequate and rapidly diminishing disposal capacity for municipal waste. *See* 53 P.S. § 4000.102(a)(2) (legislative findings).

Waste disposal methods, ranked in descending order of environmental impact, include: source reduction and reuse, waste combustion, and landfilling. *See* Vago, 22 N.KY.L.REV. at 106. Environmentally advanced, innovative waste disposal facilities can cost "in the tens to hundreds of millions of dollars to construct." *See* Vago, 22 N.KY. L.REV. at 108. State and federal environmental mandates often require the use of these new, more expensive facilities. Petersen & Abramowitz, 22 FORDHAM URB. L.J. at *7 [n. 66]. Securing long term access to disposal facilities necessary to protect the citizens' health and safety "requires long-term commitments, debt and security." *Id.* [n. 66]. Methods less protective of the environment generally have lower capital and operating costs, and thus can charge a lower tipping fee.

B. THE RESPONSE

Until the Tax Reform Act of 1986 repealed many of the tax incentives, most waste disposal facilities were privately owned and operated. *Id.* at *4 [n. 36]. In response to the tax changes and increased costs caused by environmental regulation, increased public ownership became necessary, shifting the financing

burden to the local governments. With this burden came risk. Even where the municipal government contracts with a private operator to construct or upgrade the disposal facility, the municipality often continues to bear the risk of an inadequate waste supply through municipal guarantees. Consequently, "it is the ability of local governments to control these haulers and where they transport the collected waste that often determines the feasibility of the solid waste processing disposal programs." *See* Petersen & Abramowitz, 22 FORDHAM URB.L.J. at *2 [n.31].

Flow control ordinances, enacted by a number of states attempting to deal with these waste disposal crises, create a system in which waste haulers are licensed by the municipality and are directed to take the waste collected to landfills that have been designated by the county. By conditioning the haulers' licenses on their compliance, local governments can assure a certain minimum revenue at the designated sites. Flow control both guarantees that a certain volume will be deposited and enables the operators of the designated landfill to collect a "tipping fee"[3] high enough to cover the cost of processing. Indeed, tipping fees are typically based on both the system's construction cost and the estimated amount of waste that will be deposited there annually. In some cases, the municipalities actually set the tipping fee contractually.

Given the municipalities' reliance on the higher rates in effect when the municipalities were constructing and financing these facilities, flow control ordinances have been crucial to the financial viability of these facilities in the wake of the

---

3. The tipping fee is the price charged haulers to dump a ton of waste at a landfill.

precipitous decline of tipping fees.[4] Indeed, flow control has "been a vital economic element in supporting dozens of major waste-to-energy and landfill based waste disposal programs involving billions of dollars in capital investment." Petersen & Abramowitz, 22 FORDHAM URB.L.J. at *2 [n.25].[5]

C. PENNSYLVANIA'S MUNICIPAL WASTE ACT

In responding to its own solid waste crisis, the Pennsylvania legislature enacted the Municipal Waste Act (the "Act") to protect the public health, safety and welfare from the short- and long-term dangers of the transportation, processing, treatment, storage and disposal of municipal waste. *See* 53 P.S. § 4000.102(g)(3). The Act establishes a system requiring each county to plan for the long-term processing and ultimate disposal of its waste. In authorizing each county to adopt flow control ordinances, the Act explicitly set forth the policy goal of such flow control legislation:

---

4. Although the waste disposal crisis had evidenced an acute shortage of environmentally sound landfill capacity, the market eventually responded to the increased price; in fact, there were so many entrants into the waste disposal market, constructing so many new facilities, that tipping fees collapsed. Thus, while landfills could contract for tipping fees between $35.00 per ton (Mercer County) and $52.00 per ton (Chester County) approximately five years ago, current spot rate tipping fees are approximately $17.50 — $30.00 per ton.

5. Until *C & A Carbone, Inc. v. Town of Clarkstown*, __ U.S. __, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), discussed *infra*, these ordinances had withstood a variety of constitutional challenges including due process, antitrust, and Commerce Clause challenges. Petersen & Abramowitz, 22 FORDHAM URB.L.J. at *8-9 [nn.67-110]. Indeed through the late 1980s, federal courts entertaining Commerce Clause challenges to flow control found that even flow control schemes involving export bans had only an incidental burden on commerce, and therefore did not discriminate against interstate commerce. *Id.* at *9 [n.100].

Appendix B

> Authorizing counties to control the flow of municipal waste is necessary, among other reasons, to guarantee the long-term economic viability of resource recovery facilities and municipal waste landfills, to ensure that such facilities and landfills can be financed, to moderate the cost of such facilities and landfills over the long term, to protect existing capacity and to assist in the development of markets for recyclable materials by guaranteeing a steady flow of such materials. § 102(a)(10).

Under the Act, counties may designate for a ten-year period the facilities at which waste generated within the county will be processed or disposed. *See* 53 P.S. § 4000.303(e). Such facilities do not have to be located within the county, although one provision of the Act states that "[p]roper and adequate processing and disposal of municipal waste generated within a county requires the generating county to give first choice to new processing and disposal sites located within that county." 53 P.S. § 4000.102(a)(6). Each county must consider alternative facilities and programs, and "provide reasonable assurances that the county utilized a fair, open and competitive process for selecting such facilities or programs from among the alternatives which were suggested to the county." 53 P.S. § 4000.502(f)(2). In addition, if a county proposes to own or operate a municipal waste processing or disposal facility, it must explain the basis for such a proposal giving consideration to the comprehensive costs and benefits of private ownership and operation of such facilities. 53 P.S. § 4000.502(m).

The facilities designated by a county, and the process by which they are chosen, must be set out in a municipal waste

management plan. 53 P.S. § 4000.502(f). During its preparation, the plan is reviewed by a county advisory committee made up of representatives from the county's municipalities, civic groups, and industry. The committee makes suggestions and proposes any changes it believes are appropriate. 53 P.S. § 4000.503(a). At least thirty days before submitting any proposed plan revisions to the Department of Environmental Resources ("DER"), the county must submit a copy of the proposed revision to the County Advisory Committee. 53 P.S. § 4000.503(d). The county must also make the plan available for a ninety-day public review and comment period, and hold at least one public hearing on the proposed plan during this period. 53 P.S. § 4000.503(c).

After adoption by the county, a plan must undergo a municipal ratification process requiring approval by fifty percent of the municipalities in the county, representing at least fifty percent of the population. 53 P.S. §§ 4000.503(d); 504(c). The plan must then be submitted to the DER for approval, after which any party objecting to the plan may appeal to the Pennsylvania Environmental Hearing Board. If a county chooses to require that municipal waste be processed or disposed of at designated facilities by means other than contract (e.g., by ordinance), the plan must explain the basis for such a proposal and include a copy of the proposed flow control ordinance or other legal instrument. 53 P.S. § 4000.502(1).

The plan, and the list of facilities designated by the county for processing and disposal, may be revised by the county at any time but must be revised at least three years prior to the time that the remaining capacity for a county is exhausted. 25 Pa.Code § 272.251(b); 25 Pa.Code § 272.251(a)(1).

Appendix B

D. THE HARVEY CASE

1. The Chester County Plan

Harvey is a Delaware corporation operating in Pennsylvania, Maryland and Delaware as an interstate collector, hauler and processor, *inter alia*, of municipal solid waste. Harvey is a licensed hauler of municipal solid waste in Chester County, Pennsylvania.

On May 30, 1989, the Chester County Board of Commissioners appointed the Chester County Act 101 Municipal Waste Advisory Committee. The Committee evaluated six potential waste management methods in order to select the components that would constitute the Chester County solid waste management system: waste reduction, recycling, waste-to-energy technology, a trash-for-ash exchange, transfer stations and landfilling. In addition, the Committee participated in four day-long site inspections of existing waste disposal and processing facilities located in Baltimore, Maryland and Chester County, Montgomery County, Philadelphia, and York, Pennsylvania. The Committee also attended a presentation on the Westinghouse resource recovery facility located in the City of Chester, Pennsylvania.

The Committee held 13 meetings between July 11, 1989, and March 20, 1990, to discuss the elements of the County's waste management plan. Although these meetings were open to the public, they were advertised only in the Daily Local News, a Westchester paper with a circulation of approximately 45,000. The Committee then prepared a draft plan, and on May 29 and May 31, 1990, conducted public hearings to entertain public comment on the draft plan. The record does not reveal how these public meetings were advertised or how many people attended. The Committee approved revisions based on that public comment. Harvey did not participate in the process, either as an

advocate of an alternative site or as a commenter. The record does not contain any explanation for Harvey's absence, but it appears that Harvey did not have significant business in the County prior to 1990.

The County Commissioners adopted the updated Plan on September 25, 1990, and the DER granted its final approval on April 11, 1991. The Plan contained key components of the committee's draft plan, including the decision to designate the Southeastern Chester County Refuse Authority Sanitary Landfill (the "SECCRA Landfill") and the Chester County Solid Waste Authority Lanchester Sanitary Landfill ("Lanchester Landfill") as the primary disposal sites for the County. The County selected these two sites from among those considered because "the haulers of trash in the County had established a historical pattern of disposal at these landfills." County Br. at 11. In fact, the County had played a role in financing the Lanchester landfill. In 1984, the County purchased it and turned its operation over to the Authority. The County financed the purchase with $42.55 million in Authority revenue bonds which carry a County guarantee. After the purchase, the County guaranteed an additional $41.5 million in Authority debt, secured a $9.2 million letter of credit, and agreed to provide the Authority with an additional $9.5 million for landfill projects.

In response to concerns voiced by Committee members that the "northern tier" of the County might be adversely affected by the system proposed by the Committee (i.e., designating only the SECCRA and Lanchester landfills), the Committee voted to recommend that the Pottstown Landfill, a privately owned facility located in adjacent Montgomery County, be included in the Plan as a disposal option.[6]

---

6. The Pottstown facility was approved to receive waste only from certain areas within the county, and the amount of waste it could receive was capped at the amount deposited by the county at the facility in 1989.

Appendix B

Initially, the 1990 Plan did not mandate the adoption of flow control. The DER informed Chester County during its review process, however, that it would not approve the Plan unless the County flow controlled its waste. DER letters of 3/12/91; 4/11/91; committee notes. Consequently, the County commissioners enacted a flow control ordinance on April 2, 1992. The ordinance divides the County into two service areas: the SECCRA Landfill service area and the Lanchester Landfill Service Area. Municipal waste generated in these service areas must be disposed of at the facility designated by the County to receive the waste. A certain amount of waste may also be taken to the Pottstown landfill. The terms of the ordinance permit amendment to designate other facilities and do not prohibit out-of-state facilities from applying.[7] However, the indentures of the revenue bonds and administrative agreements between the County and the Authority stipulate that the County will oppose the construction, acquisition, operation or designation of any facility that might divert revenue from Lanchester. (Committee letters to DER seeking permission not to consider additional sites for designation).

---

7. The Ordinance defines a Designated facility as follows:

> the Lanchester Sanitary Landfill owned and operated by the Chester County Solid Waste Authority, located in Honeybrook Township, Chester County and Caernarvon and Salisbury Townships, Lancaster County; the Southeastern Chester County Refuse Authority Sanitary Landfill, located in London Grove Township, Chester County; the Pottstown Landfill owned and operated by SCA Services of Pennsylvania, Inc., located in West Pottsgrove Township, Montgomery County; or any other County designated Municipal Waste processing or disposal facility.

Appendix B

2. Procedural History

Harvey filed its complaint in the district court on June 15, 1994, challenging Chester County's flow control plan under the Federal Constitution's Commerce Clause, Art. I, § 8, Cl. 3. Harvey alleged that the regulations isolate the County from the interstate solid waste market by prohibiting the export of locally generated waste to out-of-state disposal and by similarly prohibiting the import of waste processing and disposal services from out of state. On June 27, 1994, Harvey moved for a preliminary injunction to enjoin enforcement of the relevant regulations adopted pursuant to the ordinance. After a hearing, the district court denied the motion on the grounds that Harvey had made an insufficient showing of immediate and irreparable harm. A trial date was set for September 12, 1994.

Prior to trial, the parties filed cross motions to determine the standard of review and, thus, who would bear the burden of proof. The district court granted the defendants' motion to apply the *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) balancing test since it found that the Chester County Ordinance did not discriminate on its face or in purpose or effect against interstate commerce. September 8, 1994 Order. Harvey conceded that it could not prove its case under the *Pike* standard and therefore stipulated to an order of final judgment Harvey appealed.

E. THE TRI-COUNTY CASE

1. The Mercer County Plan

Plaintiff/appellant, Tri-County Industries, Inc., is a Pennsylvania corporation doing business in Mercer County,

Pennsylvania. In late 1989, the Mercer County Commissioners formed the Mercer County Solid Waste Authority ("MCSWA") to implement the County's duties under the Act. Mercer County generates approximately 5,000 tons of municipal waste each month.

After retaining the services of an independent consultant, Mercer County decided that the best solution for this fairly small county would be to contract with a single disposal facility. The County prepared detailed bid specifications for the needed municipal waste capacity. The Request for Proposals ("RFP") was advertised nationwide and was obtained by twenty-three companies around the country. Although many of these companies were located in Pennsylvania, others were located in Ohio, New York, Maryland, New Jersey, Minnesota and Louisiana. Only four companies, including the appellee, Tri-County, submitted a bid in response to the RFP, and none of these was from outside Pennsylvania. The successful bidder was Waste Management of Pennsylvania, the owner of a landfill in Butler County.

By its terms the process outlined by Mercer County in its RFPs does not discriminate against in- or out-of-state interests. The RFP requirements apply equally to all disposal facilities, irrespective of their location. *Id., see also* RFP 1.4(g). The plan was submitted to DER in the fall of 1990 and approved in March, 1991. After DER approved the Plan, MCSWA contracted with the successful bidder, and Mercer County adopted the now contested Ordinance, No. 6-1991. The ordinance requires each hauler in the county to obtain a license and to haul municipal waste generated in the county to the landfill designated in the county plan "as it may be revised from time to time." Section 3, 6-1991.

Appendix B

Although the Plan required Tri-County to haul the waste to the Butler facility and pay the $35 per ton tipping fee, Tri-County in fact took some of its waste to two other facilities in Ohio which charged tipping fees of only $17.20 and $27.95 per ton. Of the approximately 600 to 900 tons of waste Tri-County hauled monthly, it took 500 tons per month to the non-designated, Ohio facilities. The MCSWA notified Tri-County by letter dated March 19, 1993, that it would hold a hearing on April 15, 1993, to determine whether Tri-County's waste hauling license should be revoked for its failure to deliver all of its waste to the designated facility.

2. Procedural History

In response to this notice of hearing, Tri-County filed this declaratory judgment action in the district court seeking a declaration that the ordinance violated the Commerce Clause, and a permanent injunction enjoining its enforcement. It also moved for a preliminary injunction, and the district court held hearings on that motion, which the court then denied. After some discovery, the parties filed a joint stipulation of fact and a joint motion to enter judgment on the basis of the evidence before the district court.

In October 1994, the district court entered judgment for Tri-County on the grounds that the ordinance, by requiring that all waste generated within the county be taken to the designated landfill in Butler County, operated to impermissibly burden interstate commerce. This appeal followed.

Both of these appeals involve the district courts' choice of the applicable legal standard. Since this involves the selection, interpretation and application of legal precepts, our review is

plenary. *See Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993).

II. THE LEGAL FRAMEWORK

A. THE GENERAL COMMERCE CLAUSE JURISPRUDENCE

The Commerce Clause provides that "[t]he Congress shall have Power . . . to regulate Commerce . . . among the several States." U.S. Const. Art. I, 8, cl. 3. "Although the Clause speaks in terms of powers bestowed upon Congress, the Court has long recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980). That is, the Commerce Clause has a negative or dormant aspect which limits state authority to regulate areas where "Congress has not affirmatively acted to either authorize or forbid the challenged state activity." *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 710 (3d Cir.1995) (quoting *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 392 (3d Cir.1987)). None of the parties has argued that Congress has either prohibited or authorized the flow control ordinances at issue here.[8] Consequently, we must consider whether these ordinances violate the dormant Commerce Clause.

---

8. As with any dormant commerce clause issue, "[i]t is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *See Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986). Congress can in effect overturn a Supreme Court decision simply by explicitly giving the states the authority to regulate. In her concurrence in *Carbone*, Justice O'Connor considered whether Congress' passage of the Resource Conservation and

(Cont'd)

Appendix B

In considering Commerce Clause challenges, court should " 'determine whether action taken by state or local authorities unduly threatens the values the Commerce Clause was intended to serve.' " *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 399 (3d Cir. 1987) (quoting *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 5-7, 106 S.Ct. 2369, 2372-73, 91 L.Ed.2d 1 (1986)). "[T]he Commerce Clause is designed to eliminate protectionist restrictions on interstate trade which typically characterize international trade, such as embargoes, quotas, and tariffs." *Oberly*, 822 F.2d at 399; *see also New Energy Co. v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302 (1988) (explaining purpose of the clause as prohibiting "economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors"). Because of that animating purpose, the Court has applied a two-step inquiry to determine whether a challenged ordinance or regulation violates the Commerce Clause.

(Cont'd)

Recovery Act ("RCRA"), 42 U.S.C. § 6941 *et seq.*, constituted such an authorization. Although she conceded that the statute (in conjunction with its legislative history) could be read to empower states to adopt flow control ordinances, she maintained that, in order to authorize potentially discriminatory state regulation, Congress must speak explicitly and unmistakably. *Carbone*, __ U.S. at __ - __, 114 S.Ct. at 1691-92. Because RCRA did not constitute such an explicit pronouncement, she concluded that RCRA could not serve as the necessary enactment. In the wake of *Carbone*, Congress has considered legislation providing for such explicit authorization of flow control schemes. Although the Senate passed the bill known as the Interstate Transportation of Municipal Solid Waste Act of 1995, S.534, *see* 141 Cong.Rec.S.6728, which would have grandfathered many of the flow control ordinances enacted to finance existing facilities, the bill has not passed the House. Thus, we must consider whether the ordinances involve here survive the *Carbone* test.

Appendix B

The first step involves determining whether the ordinance discriminates against interstate commerce; discrimination is defined as the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Syst. Inc. v. Dept. of Environmental Quality of Oregon*,__U.S. __, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). If "a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 137, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (citing *Hughes v. Oklahoma*, 441 U.S. at 336, 99 S.Ct. at 1736); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10, 49 S.Ct. 1, 3, 73 L.Ed. 147 (1928).

But if the ordinance does not discriminate against interstate commerce either in purpose or effect, it is subjected to a balancing test whereby the statute will be upheld unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). For instance, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981), the Court upheld a Minnesota statute that banned the retail sale of milk in plastic jugs. Because the statute imposed burdens on both in-state and out-of-state dairies, it was subjected only to the *Pike* balancing test. After determining which standard to apply, courts must then determine whether the statute can meet the test enunciated under the appropriate standards.

Appendix B

1. Triggering Strict Scrutiny:
Discriminatory Purpose *or* Effect

A regulation serving a protectionist purpose is obviously invalid since a discriminatory purpose is *a fortiori* illegitimate. *See Philadelphia v. New Jersey*, 437 U.S. at 624, 98 S.Ct. at 2535 (characterizing a statute with a protectionist purpose as virtually *per se* invalid). More benign purposes, however, do not immunize the statute from the challenge since "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.* 437 U.S. at 626, 98 S.Ct. at 2536; *see also Fort Gratiot Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353, 359, 112 S.Ct. 2019, 2024, 119 L.Ed.2d 139 (1992) (invalidating legislation with legitimate goals since even valid purposes may not be accomplished "by the illegitimate means of isolating [the county] from the national economy").

If a statute's purpose is not manifestly discriminatory, the court must determine "how directly [the statute] burdens interstate commerce and how evenhandedly it impacts interstate and intrastate commerce." *Stephen D. DeVito, Jr. Trucking v. RISWMC*, 770 F.Supp. 775, 781 (D.R.I.1991); *see also Carbone*, __ U.S. at __, 114 S.Ct. at 1684 (courts look beyond explicit terms of statute to examine its practical purpose or effect); *Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736; *Taylor*, 477 U.S. at 138, 106 S.Ct. at 2447; *Fort Gratiot*, 504 U.S. at 358-61, 112 S.Ct. at 2023-25 (either purpose or effect can trigger strict scrutiny); *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 406 (3d Cir.1987). This court has expressed some doubt whether a showing of discriminatory effect alone could suffice. *See Oberly*, 822 F.2d at 400-01 n. 18. But Carbon and the entire line of recent Supreme Court cases have clarified that either purpose or effect

will trigger strict scrutiny analysis. We also note that where the showing of effect is weak, demonstrating discriminatory purpose buttresses the case.

As we explained, the purpose of the dormant Commerce Clause is to prevent "[s]tate and local governments [from using] their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Carbone*, __ U.S. at __, 114 S.Ct. at 1684; *see also H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. at 537-38, 69 S.Ct. at 664-65 ("What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."). The purpose of the dormant Commerce Clause is not to protect individual firms. In *Exxon Corp. v. Maryland*, 437 U.S. 117, 126, 98 S.Ct. 2207, 2214, 57 L.Ed.2d 91 (1978), the Supreme Court upheld a statute prohibiting a petroleum producer or refiner from operating retail service stations within the state. The Court explained:

> While the refiners will no longer enjoy their same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

Id. 437 U.S. at 126, 98 S.Ct. at 2214. Conversely, the one-time selection of an in-state interest does not by itself establish a discriminatory effect unless the selection confers an unreasonably long-term benefit.

Appendix B

This Court has recently rejected attempts to characterize all legislative schemes which award business to a successful bidder as Commerce Clause violations. *Atlantic Coast*, 48 F.3d at 714-15. Although we recognized that regulations of public utilities (including those that require the utility to secure its capacity within the state) are now subject to the same Commerce Clause scrutiny as non-utility statutes, we found significant precedent for local government authorities to select a single service provider in the public utility context:

> A gas or electric utility granted a franchise to serve the needs of all residents within a local area is not ordinarily required to commit to producing its electricity or securing its natural gas supply within that area as well. Normally, both in-state and out-of-state interests may, therefore, compete equally for the franchise award and the creation of a captive consumer base does not, under these circumstances, discriminate against electricity and gas generated or produced out of state.

48 F.3d at 715.

Carbone explicitly rejected the argument that a disputed statute would have to favor all in-state businesses as a group — a statute may be invalid if it favors only a single or finite set of businesses. __ U.S. at __ - __, 114 S.Ct. at 1682-83. Consequently, where a challenge is based on the alleged favoritism of a finite set of in-state interests (rather than all in-state businesses), it must be demonstrated that the ordinance actually *favors* the chosen in-state providers. That the ordinance

requires the use of the selected facility, thus prohibiting the use of non-designated facilities (which may be out of state), does not itself establish a Commerce Clause violation.

B. THE SOLID WASTE COMMERCE CLAUSE JURISPRUDENCE

The Early Case

The Supreme Court first recognized that the interstate hauling of solid waste was commerce for the purposes of Commerce Clause analysis in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). In that case, the Court struck down a New Jersey ordinance that prohibited the importation of solid or liquid waste that originated out-of-state. While New Jersey could pursue its goal of restricting access to its diminishing waste disposal facilities, it could not do so by blocking only out-of-state waste. *Id.* at 626-27, 98 S.Ct. at 2536-37. The Court explained that such a clear example of purposeful economic protectionism — a virtual import ban — is subject to a *per se* rule of invalidity. *Id.* at 625, 98 S.Ct. at 2536.

Despite the solid waste disposal crisis of the 1980s, the Supreme Court has invalidated each of the ordinances that attempted to ban or to levy differential surcharges on waste generated out-of-state. *See, e.g., Fort Gratiot*, 504 U.S. at 353, 112 S.Ct. at 2019 (1992) (invalidating regulation prohibiting out-of state waste in the landfill unless authorized by Congress); *Oregon Waste Sys. Inc. v. Dept. of Environmental Quality of Oregon*, __ U.S. __, 114 S.Ct. 1345, 12 L.Ed.2d 13 (1994) (voiding differential charge); *Chemical Waste Management Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009. 119 L.Ed.2d 121 (1992) (same).

Appendix B

In response to these successful constitutional challenges, municipalities sought other means of managing solid waste disposal. Instead of attempting to limit the quantity of waste by banning or discouraging the importation of out-of-state waste, local governments opted to expand the capacity of their waste disposal facilities. They obtained the financing for these expansions by adopting flow control ordinances, which were necessary to reassure the bondholders (and the underwriters). Dormant Commerce Clause challenges to these statutes ensued.

C. *CARBONE*

In *C & A Carbone, Inc. v. Town of Clarkstown*, __ U.S. __, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), the Supreme Court transposed its skepticism of waste control initiatives to flow control ordinances. Reversing the decision of an intermediate appellate court, the Court struck down Clarkstown's law requiring all nonhazardous solid waste within the town, whether or not generated in the town, to be deposited at a town-designated transfer station. The town had arranged with a private contractor to construct the designated site (which was within the town, and perforce in-state) in return for the town's commitment to deliver and pay for the processing of at least 120,000 tons of solid waste annually. At the end of a five year period, the town could purchase the facility for one dollar. Because the town's guaranteed tipping fee was higher than the cost on the private market, the town needed to adopt the flow control ordinance to obtain the fee from the haulers and to minimize its own obligations under the guarantee agreement.

The Court found that Clarkstown's ordinance discriminated against interstate commerce by bestowing a favored status on the single waste processor within the town and by "depriving

competitors, including out-of-state firms, of access to a local market," __ U.S. at __, 114 S.Ct. at 1680. The Court was unpersuaded by the argument that the ordinance did not discriminate because it applied equally to in-state and out-of-state haulers. *Id.* at __, 114 S.Ct. at 1682 (citing *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359, 112 S.Ct. 2019, 2024, 119 L.Ed.2d 139 (1992)). Instead, the Court regarded Clarkstown's ordinance as "just one more instance of local processing requirements" that the Court has long held invalid. *Id.* at __-__, 114 S.Ct. at 1682-83 (citing cases involving statutes that required various articles of commerce to be processed within their state of origin). The Clarkstown statute fit this mold since its terms explicitly required "all solid waste within or generated within the Town of Clarkstown . . . [to be] delivered to the Town of Clarkstown solid waste facility at Route 303, West Nyack, New York and such other sites, situated in the Town." *Carbone*, __ U.S. at __, 114 S.Ct. at 1685 app. The statute did not mention any possibility of adding additional or alternative sites.

Because the single site designated by the ordinance was in state, the Court presumed that Clarkstown's ordinance had the "design and effect" of hoarding a local resource. *Id.* at __, 114 S.Ct. at 1683. That Clarkstown intended the scheme to serve as a financing measure imparted it with a discriminatory purpose, according to the Court. __ U.S. at __, 114 S.Ct. at 1684. Although the majority rejected Justice O'Connor's view that, to be discriminatory, a law must discriminate against out-of-state interests as a group, the Court still required that the law discriminate in favor of an in-state interest. __ U.S. at __-__, 114 S.Ct. at 1682 83. Moreover, the Clarkstown ordinance did not provide for amendment to add other, perhaps out-of-state sites,

and did not limit the period of the designation. Indeed, the town's likely ownership of the transfer station after five years seems to render the station's monopoly permanent.

Since *Carbone*, flow control ordinances have been subjected to searching Commerce Clause scrutiny. Some commentators have characterized the language of the *Carbone* opinion as exceptionally broad, and acknowledged that the decision places the "painstakingly privatized waste disposal systems" in jeopardy by denying the municipalities the principal means of support they have used to finance such facilities. Petersen & Abramowitz, 22 FORDHAM URB.L.J. at *15 [n. 170]; *see also Vago, The Uncertain Future of Flow Control Ordinances*, 22 N.KY.L.REV. at 105, 107 (citing examples of endangered facilities); and 109 (describing impracticality of Court's municipal bond suggestion). While *Carbone* undisputedly sweeps quite broadly, we do not read it to establish a *per se* rule subjecting all flow control ordinances to strict scrutiny. Whether strict scrutiny applies is crucial because its application is usually fatal to a challenged regulation.

D. *ATLANTIC COAST*

We applied *Carbone* in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir.1995). *Atlantic Coast* involved a challenge to New Jersey's solid waste management regime, which was adopted in response to that state's especially severe solid waste crisis during the 1970s and '80s. Provisions of the Solid Waste Management Act, N.J.Stat.Ann. § 13:1E-1 to -207 (West 1991 & Supp.1994), and the Solid Waste Utility Control Act, N.J.Stat.Ann. § 48:13A-1 to 13 (West Supp.1994), authorized the local waste districts to adopt flow control

ordinances mandating the delivery of certain wastes to designated facilities that charge higher tipping fees in order to cover operating expenses and repay revenue bonds used to finance the capital expenditures of constructing these facilities.

In addressing the challenge, we reject, the attempt to frame the issue as one of constitutionality of the statute after the designation was made, thus refuting the contention that the challenged ordinance, which required waste to be deposited at the designated facility (which was in-state), amounted to an export ban. We found significant precedent allowing local government authorities to select a single service provider in the public utility context:

> A gas or electric utility granted a franchise to serve the needs of all residents within a local area is not ordinarily required to commit to producing its electricity or securing its natural gas supply within that area as well. Normally, both in-state and out-of-state interests may, therefore, compete equally for the franchise award and the creation of a captive consumer base does not, under these circumstances, discriminate against electricity and gas generated or produced out of state.

48 F.3d at 715.

Nevertheless, in *Atlantic Coast* there were strong indications that in-state and out-of-state businesses did not compete equally. The designation process set forth in the state's regulations under SWUCA and SWMA. N.J.Admin.Cod tit. 7,

§ 26-6.6, allowed for the designation of facilities in the waste district, in another waste district or out-of-state. The state's Department of Environmental Protection and Energy ("D.E.P.E.") admitted, however, that its goal was to secure the state's self sufficiency in non-recyclable waste disposal. Moreover, a district wishing to designate an out-of-state facility had to certify to the Department that there were no suitable alternatives within the state, either in their waste district or in another waste district. See N.J.Stat Ann. § 13:1E-21 (1991). Accordingly, the district court found that it was "clear that the D.E.P.E. administers the law with the specific goal that all waste generated New Jersey be disposed of within the borders of the state." (Civ. No. 93-cv-02669) (JEI).

Rather than representing a truly open and competitive process, we found that New Jersey "designation process is intended to favor operators that have facilities already located within, or those that are willing to construct a facility within, the state." 48 F.3d at 708. Indeed, in rejecting the argument that out-of-state businesses could compete for designation, we explained that the New Jersey regime, with its "core" goal of New Jersey's waste self-sufficiency in five years, assured that "out of state facilities do not compete on anything approaching a level playing field." 48 F.3d at 713. In interpreting *Carbone*, therefore, Atlantic Coast did not consider all flow control ordinances to be *per se* discriminatory (and consequently subject to strict scrutiny analysis). Instead, we focused on the process, and invalidated a scheme in which the process discriminated against out-of-state facilities.

E. OTHER CIRCUITS

Other circuits applying *Carbone* have upheld flow control ordinances. The Tenth Circuit held that an Oklahoma county's

scheme requiring operators of industrial waste disposal sites to obtain conditional use permits did not discriminate against interstate commerce. *See Blue Circle Cement v. Board of County Comm'rs*, 27 F.3d 1499, 1512 (10th Cir. 1994) (remanding for the application of the *Pike* test). The ordinance did not discriminate against the out-of-state plaintiff seeking to operate a hazardous waste fuel (HWF) conversion facility since "[i]ts site conditions apply equally, regardless of the origin of the HWF's being burned and it confers no advantages on in-state entities seeking to store, treat, recycle, or dispose of HWFs as against out-of-state firms." *Id.* at 1512.[9]

F. SUMMARY OF APPLICABLE PRINCIPLES

From our review of the caselaw, we derive the following relevant principles. Local government acts that categorically favor all in-state providers clearly violate the dormant Commerce Clause. Acts that concentrate waste hauling or processing business in the hands of a single or finite set of in-state providers are also suspect from a dormant Commerce Clause perspective. Although such regulations ultimately prohibit the transport of solid waste to nondesignated sites — which, in these cases, amounts to a prohibition on the export of waste to other states — the fact that the designated sites happened to be in-state does not, standing alone, establish that the flow control schemes discriminate against interstate commerce. To determine whether these flow control schemes

---

9. In *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995), the Ninth Circuit held that Washington's scheme requiring solid waste haulers to obtain certification from a state commission did not discriminate against out-of-state interests. The Washington scheme did not, however, designate a landfill or require that certified haulers use a particular facility and thus did not present the same issue we confront today.

actually discriminate against interstate commerce (triggering strict scrutiny analysis) the court must closely examine: (1) the designation process; (2) the duration of the designation; and (3) the likelihood of an amendment to add alternative sites, for signs that out-of-state bidders do not in practice enjoy equal access to the local market.

These precepts are fully consistent with the precedents in this area. While *Carbone* clearly has broad application, it did not establish a *per se* rule subjecting all flow control ordinances to strict scrutiny. The Court's discussion reveals that its decision was not based on the fact that waste was required to be processed at a single plant. Instead, the Court regarded Clarkstown's ordinance as "just one more instance of local processing requirements" that the Court has long held invalid. *Id.* at __-__, 114 S.Ct. at 1682-83 (citing cases involving statutes that required various articles of commerce to be processed within their state of origin). And in interpreting *Carbone*, this Court has focused on the process of selecting waste service providers rather than on the effect of the regulation once a provider or providers have been chosen. *See Atlantic Coast*, 48 F.3d at 713. That a flow control ordinance requires all waste to be processed or deposited in state for some fixed period of time, therefore, does not necessarily violate the dormant Commerce Clause unless out-of-state businesses did not compete on an even playing field for the designation. If it were the designation of a single site that offended the Commerce Clause, then a scheme "hoarding business" for an out-of-state interest would be invalid even though the scheme in no way advanced a protectionist purpose or effect.

While the process in *Atlantic Coast* clearly favored in state bidders, not every process used to select a single provider is

necessarily infected with this same parochialism. We believe, in fact, that a local authority could choose a single provider — without impermissibly discriminating against inter-state commerce — so long as the selection process was open and competitive and offered truly equal opportunities to in- and out-of-state businesses. *See* discussion of *Exxon* and *Atlantic Coast, supra* at 797-98 & 800-01.

The burden of showing that the statute discriminates rests on the party challenging the statute. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979) ("The burden to show discrimination rests on the party challenging the validity of the statute. . . ."); *J. Filiberto Sanitation, Inc. v. Dept. of Environmental Protection*, 857 F.2d 913, 919 (3d Cir.1988) ("As the party attacking the statute, Filiberto bears the burden of showing discrimination"). To make this showing, a plaintiff challenging a designation scheme like the one at issue here must show that the designation process favors, either purposely or in effect, in-state sites. We recognize the difficulties of ascertaining whether long-term designations are really necessary, and whether the selection criteria are truly objective. Courts considering flow control schemes where only in-state facilities are designated must therefore keep this difficulty in mind when scrutinizing the allegedly discriminatory criteria proffered by challengers. Admittedly, we cannot cite any authority for the sort of inquiry we will describe, but this area of law is nascent, and we are constrained to draw upon notions of reasonableness to effectuate the relevant policies.

As discrimination may reside in either purpose or effect, a number of things can demonstrate that the designation process impermissibly favored in-state interests/bidders. Certainly,

there could be direct evidence of favoritism, as there was in *Atlantic Coast*, or corrupt payments. Or a seemingly neutral bid specification with an entirely legitimate purpose, such as a specified proximity requirement, may have the effect of giving in-state interests an advantage. For instance, the incentive to protect a municipal investment, exemplified by the attempt in *Carbone* to minimize the town's exposure under the guarantee agreement, would impermissibly skew the process against a new — potentially out-of-state —provider attempting to gain designation in order to compete with an existing in-state facility.

Moreover, there may be aspects of a flow control regime that appear to be so unnecessarily restrictive that a factfinder reasonably could conclude that their real purpose was to entrench the local interest once selected by a neutral designation process. Examples of such regulations are excessively long periods of exclusive service rights under the designation, or an absence of any allowance or the absence of any real possibility for the designation of additional, potentially out-of-state sites.[10]

.. The governmental defendants can rebut a putative showing of discrimination by presenting evidence demonstrating that the designation process was open, fair, and competitive, i.e., determined by objective criteria which do not have the effect of favoring in-state interests. Courts should require that government defendants produce substantial evidence in order to rebut the plaintiff's showing. Such evidence might include bid

---

10. There are, of course, others. While we are reluctant to pass on the reasonableness of the long-term tipping fees contracted for by some municipalities implementing flow control, there may be cases where the contractual fee is so much higher than both the spot rate and the rates prevailing at the time of contract that one could conclude that the designation was being used as a vehicle to deliver an extraordinary profit to a favored facility.

solicitation, selection criteria, evaluation of bidder, *et alia*, but such evidence alone may be insufficient to prove the flow control scheme's neutrality. The government defendants in these cases might also present additional evidence, such as statistical evidence or expert testimony, demonstrating that different aspects of the designation process are as neutral to out-of-state interests in practice as they appear on their face. Municipalities that have adopted flow control schemes would also be wise to demonstrate that the goals of the designation process included capacity assurance and the protection of the public health and safety.

If the government defendant cannot satisfactorily demonstrate that the ordinance does not have the purpose or effect of discriminating against interstate commerce, it must then prove that the ordinance survives strict scrutiny analysis (in order to have the ordinance upheld). This comports with other dormant Commerce Clause contexts where, once a plaintiff has shown that a law or regulation discriminates against interstate commerce, "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. at 138, 106 S.Ct. at 2447 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979)). Of course, if the defendants succeed in the first showing, then the ordinance would be subject only to the *Pike* balancing test under which the plaintiff must prove that "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *See Pike*, 397 U.S. at 142, 90 S.Ct. at 847.[11]

---

11. We assume that these flow control ordinances will always have a sufficient effect on interstate commerce to warrant at least some Commerce Clause scrutiny.

Appendix B

III. APPLICATION TO THESE CASES

A. *HARVEY*

In granting judgment for Chester County, the district court determined that the Ordinance "does not discriminate on its face nor is the primary purpose or effect" to discriminate. The court, however, demanded too much, for in order to find a dormant Commerce Clause violation there is no requirement that discrimination must be the "primary" purpose or effect. This erroneous legal conclusion would alone mandate that we set aside the judgment and remand for consideration under the proper legal standard. Moreover, the current record creates the strong impression that the Chester County process was not sufficiently open, and that there was no real potential for amendment that could offer out-of-state bidders a fair chance at Chester County's business.[12]

In combination, Pennsylvania's Act 101 and the Chester County ordinance require that waste from within Chester County be disposed of at one of the County's designated sites, all of which are located within the Commonwealth. Harvey contends that because the County's Plan, adopted pursuant to the flow control ordinance, specifies only the Lanchester, SECCRA, and Pottstown facilities, the entire flow control scheme facially discriminates against interstate commerce. We disagree. As in

---

12. We have considered the joint motion of defendants (Chester County, the Authority, the Commonwealth of Pennsylvania, and the DER) to strike portions of appellant's opening brief and appendix. Essentially, the defendants argue that Harvey has relied on different *excerpts* from various depositions, agreements and exhibits than it did in the district court. But because the parts, albeit different parts, of the disputed materials were submitted to the district court, the materials were incorporated by reference into the record in their entirety. Thus, the Motion will be denied.

the public utility context described *supra*, local governments have the capacity, in the practical exercise of their police powers, which are at their strongest in the health and safety area, to contract with specific businesses to provide certain services. Furthermore, to accept Harvey's contention that a plan designating in-state sites facially discriminates against interstate commerce would require a local government to select out-of-state sites, irrespective of their merits, in order to withstand Commerce Clause scrutiny. This result plainly cannot prevail.

Also contrary to Harvey's assertions, this case does not resemble those cases involving export or import bans (we will refer to the alleged violation here as a ban on the importation of waste disposal site services) since those cases explicitly banned out-of-state interests from participating in the local market because they were from outside the state. *See, e.g., Philadelphia*, 437 U.S. at 624, 98 S.Ct. at 2535. *Fort Gratiot*, 504 U.S. at 359, 112 S.Ct. at 2024. We do not mean to suggest that the ordinance must have the *purpose* of discriminating against inter-state commerce, for it is well settled that ordinances which have the *effect* of discriminating also violate the Commerce Clause. *See Carbone*, __ U.S. at __, 114 S.Ct. at 1684; *Fort Gratiot*, 504 U.S. at 358-61, 112 S.Ct. at 2023-25. But if effects are the purported basis for unconstitutionality, the statute must have the consistent effect or the inherent bias of favoring one or more in-state interests.

Harvey might still prevail if it can demonstrate that the Act or the Ordinance discriminates through some aspect of the selection process which favors in-state bidders for the designation because they are local facilities. Although Act 101 does not require flow control ordinances, it does offer guidelines to those localities which adopt them. We will therefore examine both the Act and Chester's Plan, as implemented by its ordinances.

Appendix B

1. Act 101

The Act does not mandate flow control ordinances; it only authorized counties to adopt them. SA 385; § 303(a)-(e). One of the County's witnesses claimed that Pennsylvania's Act 101 directs the county to use a fair, open and competitive process to select its providers, *see* 53 P.S. § 4000.502(f)(2) requiring plan to describe alternative facilities considered and "provide reasonable assurances that the county utilized a fair, open and competitive process for selecting such facilities or programs from among alternatives"); 53 P.S. § 4000.503(c) (requiring the county to make the plan available for a 90-day public review period and hold at least one public hearing on the proposed plan); 53 P.S. § 4000.502(d) (providing that when additional disposal capacity is needed, "the county shall give public notice of such a determination and solicit proposals and recommendations regarding facilities and programs to provide such capacity").

While these provisions of the Act suggest an open process, other provisions do not seem so neutral. One provision, for example, provides that "[p]roper and adequate processing and disposal of municipal waste generated within a county requires the generating county to give first choice to new processing and disposal sites located within that county." 53 P.S. § 4000.102(6). Another provision states that County waste management plans "shall identify the general location *within a county* where each municipal waste processing or disposal facility . . . will be located and . . . explain how the site will be chosen. For any facility that is proposed to be located outside the county, the plan *shall explain in detail* the reasons for selecting such a facility." 53 P.S. § 4000.502(g) (emphasis added). By imposing an incremental administrative burden on counties attempting to designate a facility outside its borders, these provisions clearly express a preference that counties use sites within their borders.

While not as strong an expression of favoritism, the Act's preference for in-county sites resembles the policies we found offensive in *Atlantic Coast*.

Although Pennsylvania's policy preferences evidence some intent to favor in-state sites, Harvey did not attack the Act directly and did not rely upon any of these passages of the Act. With the provisions nonetheless in mind, we will therefore proceed to examine the County's implementation of the waste disposal planning mandate to determine whether Chester County officials in fact favored sites within the county.

2. The Plan

We do not doubt that the county's legitimate intention to comply with the Act[13] motivated its adoption of flow control. But legitimacy of purpose generally does not end our inquiry. If the manner in which the county implemented its flow control system, particularly the process used to designate the ten year providers, favored in-county interests, then the flow control ordinance has the effect of discriminating against interstate commerce and must be subject to the strict scrutiny test enunciated in *Taylor* and *Philadelphia*.

Chester County does indeed appear to have favored in-county interests. It is true that one cannot draw any inferences about the equity of the designation process from its description in the Chester ordinance. Section 2 of the ordinance originally defined "designated facilities" as "those processing or disposal facilities designated by resolution of the Chester County Board of Commissioners adopted in accordance with the Plan." (SA

13. There are indications that the state authority, the DER, was going to withhold approval of the plan unless it included flow control. SA331.

252). The later amended definition merely provides that the Lanchester, SECCRA, and Pottstown facilities are designated facilities but also allows "any other County designated Municipal Waste processing or disposal facility."

Other provisions of the Plan, however, do reveal a bias for designating in-county sites. For instance, the Plan provides that "The County will consider developing an *in-County* resource recovery facility" (emphasis added), if in-County landfill capacity becomes unavailable, or if the County cannot secure sufficient capacity outside the county. These particular provisions of the Plan reveal that the Committee intended to keep the waste disposal business within the County.

Although the county was not favoring all in-County sites simply because they were in state (thus not favoring in-County sites as a group), this does not preclude a finding of impermissible discrimination. Establishing discrimination requires only a demonstration that out-of-state interests did not compete for designation on a level playing field. We believe that the County's economic interest in keeping the business at home and the Plan's legislative history, *see, e.g.*, A135, suggest that the designation process did not offer a level playing field.[14] That the county sought only to provide environmentally safe waste disposal capacity, a legitimate exercise of its police powers, would not save the Plan: as we have explained, "the evil of

---

14. Although the county's pre-existing economic interest in the designated landfill creates the incentive for the county to favor these in-state sites in violation of the dormant commerce clause, not every case where the county has an economic stake in the designated site will result in such a violation. The county could, for example, have selected the designated sites in an open, fair and competitive process, and then made investments in improving those sites. The length of the period of designation would, of course, have to be related to the amount of the investment.

protectionism can reside in legislative means as well as legislative ends." *Philadelphia*, 437 U.S. at 627, 98 S.Ct. at 2537.

a. Designation

Harvey claims that, in preparing the Plan, "the County never considered any out-of-state landfill for designation or allowed any such facility to submit a bid to accept County waste." If supported, these allegations would establish that out-of-state sites did not compete on a "level playing field" and that the process had the effect of discriminating against interstate commerce. At least some of these accusations are not borne out by the record, however, The County included a description of the Waste Advisory Committee's consideration of alternative sites, one of which was in Baltimore, Maryland, and one in Philadelphia.[15]

But other aspects of the County's process are less reassuring. While the Committee met 13 times to discuss various aspects of the plan and evaluate the alternative waste disposal strategies and facilities (app. 23), and while these meetings were supposed to be open to the public, they were advertised in only one small, local newspaper, the *Daily Local News*. Public hearings to review the draft Plan were held on May 29 and 31, 1990, but there is no reason to believe that those meetings were any better publicized.[16] In the end, the Committee selected the

---

15. It is not clear whether the Committee actually considered designating those sites or whether it was simply investigating an alternative method of waste disposal. If the Committee never considered designating those sites, that would increase the impression that the process favored the in-state facilities.

16. Of course if the County can demonstrate on remand that the relevant

(Cont'd)

two in-county sites that already served as the primary disposal sites for the County's waste. The Pottstown facility was designated as an alternate only after the process was concluded (as the result of two letters and public comment received during the review and comment period). Two factors in particular create the impression that parochialism rather than competition determined the outcome of the designation process: (1) that established local businesses won the designation; and (2) that the Pottstown site was designated as an alternative after the process had concluded — a status that appears to have been specially created for this situation.

b. Escape Valves: Amendment

The capacity to amend the Plan in order to add additional sites does not appear sufficiently to mitigate the effect of having chosen the established in-state interests. If the amendment process were open and fairly liberal, it could conceivably save the initially discriminatory effect of "home cooking." But the amendment process in Chester's Plan is quite constrained: additional sites can only be designated if the existing facilities have insufficient capacity, are unable to obtain expansion permits, develop unforeseen environmental problems which preclude continued use of those facilities, or are subject to regulatory changes which affect their capacity or preclude their

---

(Cont'd)
out-of-state market participants knew about the designation opportunity anyway — and perhaps word of such proposals travels quickly through the trade grapevine — that would rebut the evidence about the lack of adequate publicity and tend to show that the process was open. Similarly, if the County could demonstrate that the publication was a specialized trade journal which effectively notified the relevant market participants despite its relatively small circulation, that would also refute evidence that the bidding process was closed.

continued use. *See* Chester County Selection and Justification of Municipal Waste Management Program § 6.3.4. The prospect that an out-of-state site could gain designation through the amendment process is too remote to equalize the opportunity for out-of-state businesses, which were initially shut out, to participate in the local waste disposal market.

There were, moreover, indications that the Committee had no intention of designating additional facilities. First, one of the Committee members wrote to the DER specifically requesting guidance on whether the County was "obligated to review each request formally" since it did "not wish to designate additional disposal facilities at this time." Second, the Authority had covenanted in the 1990 bond indenture not to "construct, acquire or operate" any waste processing plants, structures, facilities or properties which would compete for revenues with those already designated by the Authority.[17]

c. Economic Interest

It also appears that Chester County may have had an economic motive for favoring certain in-county sites. The County had purchased the Lanchester landfill through the issuance of $42.55 million in revenue bonds. (b.8). The County has guaranteed an additional $41.5 million in Authority debt, secured a $9.2 million letter of credit, and committed to provide the Authority with an additional $9.5 million for landfill projects. That the flow control ordinance was not adopted until

17. Despite this documentary evidence indicating that there was little chance of an amendment, Chester County's counsel represented at oral argument that the county would consider amending the Plan to designate any facility that submitted a suitable bid. The district court will want to probe these conflicting indications on remand.

after the county had financed the authority's purchase of SECRA does not lessen its incentive to assure the Authority's revenues and thereby shield its exposure under the guarantee agreement.

Flow control certainly would be an effective means to achieve this end: designation conferred on the three selected sites the capacity to charge 200-300% of the prevailing tipping fees at alternative sites. Lanchester charged $57 per ton and SECCRA charged $52 per ton. The Baltimore facility, by contrast, charged only $34 per ton. Furthermore, the legislative history of the flow control scheme suggests that this financial pressure did indeed play a role. The County's Administrative Agreement with the Authority also reflects this pressure. In that agreement, the County committed "not to adopt a new Plan or to amend the existing plan in such a manner as to reduce the existing service area of the Authority or to narrow the definition of municipal waste directed to the Authority, [the owner of the SECCRA facility]." SA 373, § 6(a) [Amended and Restated Administrative Agreement].

The need to protect the county's financial interests thus appears to have played a role in the county's decision to adopt flow control. In this respect, this case closely resembles *Carbone*, where the Supreme Court found discriminatory Clarkstown's "avowed purpose ... [of] retain[ing] the processing fees charged at the transfer station to amortize the cost of the facility." __ U.S. at __, 114 S.Ct. at 1680.

3. Summary

While the Act requires a fair, open and competitive process, and while the Committee did consider at least one out-of-state and several out-of-county sites, it appears that Chester County's

designation process did not afford other sites, including out-of-state sites, level playing field. Because, for the many reasons stated, the process appears to have been biased in favor of the Lanchester, SECCRA and Pottstown facilities, the Plan and its implementing ordinances might have the effect of discriminating against interstate commerce. Nevertheless, because the district court did not have the benefit of *Atlantic Coast* or of the clarifications we offer today, we will remand so that the district could may consider Chester County's flow control scheme in light of these principles. We therefore reverse the judgment and remand for further proceedings consistent with this opinion.

B. *TRI-COUNTY INDUSTRIES, INC. V. COUNTY OF MERCER*

The district court in the Western District of Pennsylvania found that the Mercer County flow control scheme enacted pursuant to the Act discriminated against interstate commerce and granted injunctive relief in favor of the plaintiff/hauler. The district court opined: "It is the designation of a single, in-state landfill, rather than the process by which it was designated, that has resulted in the discrimination against interstate commerce." This conclusion is at odds with our conclusion that the focus should be on the designation process, on the reasonableness of the duration of the designation and on the practical likelihood of an amendment to designate an out-of-state facility.

Despite the erroneous legal standard used by the district court, we could affirm its decision if it appeared that these aspects of Mercer County's flow control scheme discriminated against interstate commerce. But we are not convinced that the facts in the record can establish either that Mercer County's

designation process was truly discriminatory, that the contractual tipping fee was unreasonable at the time the site was selected, or that there was insufficient likelihood of amendment to show that the scheme discriminated against out-of-state bidders. For these reasons, and those explained *infra*, we must reverse and remand for further development of these aspects in order to gauge the real extent of the opportunity enjoyed by out-of-state providers to participate in the Mercer County waste disposal market.

The Mercer County scheme resulted in the designation of a single site. Although the designated site is not located within Mercer County, it is in Pennsylvania. It is possible that the site's selection resulted from in-state prejudice. Because *Carbone* rejected the argument that a statute had to favor all in-state interests as a group in order to be discriminatory, the fact that Mercer's scheme allegedly favors only a single in-state site does not preclude a Commerce Clause challenge. Nevertheless, that only one in-state site has been selected under the county's designation process provides less evidence that the process has a discriminatory effect — that is, that the process tends to select in-state sites — than if a greater number of in-state sites had been selected in the designation process.

As with *Harvey*, the flow control scheme in this case also results from the interaction of Pennsylvania's Act 101 with the County's waste control plan and its implementing ordinances. Because a discussion of the nature of the Act would largely repeat the discussion *supra* in connection with the *Harvey* case, we will limit our discussion to the County's Plan.

1. Designation

In operating its Plan, Mercer County made a significant

attempt to open its designation process to out-of-state sites. Unlike *Atlantic Coast*, where the scheme had the explicit goal of securing in-state disposal capacity, Mercer County officials testified that no preference was given to in-state or out-of-state facilities. And unlike Chester County, the county prepared detailed bid specifications and advertised its RFP *nationwide*. Twenty-three companies purchased the RFP package, including companies from Pennsylvania, Ohio, New York, Maryland, New Jersey, Minnesota and Louisiana. Only four companies submitted bids in response to the RFP, and they all had landfills in Pennsylvania. The appellee, Tri-County, was among the four which submitted bids. As the district court acknowledged:

> [T]he failure of the Authority to designate an out-of-state disposal facility was not the result of discrimination. Rather, it was attributable to the failure of any out-of-state disposal facility to bid on the contract, and the evidence clearly established that the procedures followed by the Authority in selecting a disposal site were "fair, open and competitive," as required by Act 101.

Dist.Ct.Op. at 13. (citation omitted). These facts certainly suggest that the process was fair, open, and competitive. Nevertheless, on remand Tri-County may be able to identify specifications of the bid or decisional criteria with a discriminatory effect.

2. Lack of Economic Interest

Because the county had a relatively small economic interest in the facilities economic performance (it received a $1 per ton surcharge on the waste dumped at the facility), the district court

concluded that the ordinance did not foster economic protectionism. As we have seen, and as the district court recognized, that the ordinance serves legitimate local purposes, does not save Mercer County's flow control scheme if it has the effect of favoring in-state interests. But the relative lack of economic interest refutes at least one basis for the argument that the designation process did not really offer a level playing field to out-of-state competitors.

3. Potential for Discriminatory Effect

We still must directly address the question whether the selection criteria have the effect, irrespective of the County's intent or its economic interests, of favoring in-state interests. We emphasize that this case does not involve facial discrimination: the designation process set objective criteria to choose the facility. Moreover, the RFP requirements *applied* equally to all disposal facilities, irrespective of their location. While this provision appears to rule out special dispensations for in-state sites, it does not preclude the possibility that some of the requirements were in practice more burdensome for out-of-state interests. That a number of out of state companies requested the RFP package but that not a single out-of-state interest submitted a bid raises the concern that some aspect of the RFP discouraged out of state interests.

We recognize, of course, that there was a considerable attrition rate in this process overall, which may indicate that Mercer County's business was not terribly attractive to *any* landfill operator. Indeed, of the twenty-three companies (in- or out-of-state) who requested the package, only four submitted a bid. On this record, however, it is impossible to determine whether the bid requirements had — or would tend to have — a

disparate effect on out-of-state businesses. On remand, the district court might consider statistical or other evidence regarding the differential drop out rates of firms in this contested designation process and/or expert testimony on the issue whether any specific RFP requirement was in fact more costly or burdensome for an out-of-state site to comply with.

4. Amendment

It is important to note that Mercer's scheme would be less problematic if a realistic opportunity existed for an out-of-state landfill to compete for at least some of the county's business within a reasonable period, either because amendment to designate an additional site was more likely or because the contract period was not so long. Although the County did have the capacity to amend its Plan to designate an additional site,[18] the County conceded that it probably did not have enough waste to justify adding another facility, especially since the county had been advised that it would be most efficient for it to use a single site. Dist.Ct.Op., Add. 32-33. The designation of the site in this case, therefore, effectively amounts to the grant of a monopoly for the period of the designation. Because the Act required the counties to secure ten-year access to disposal capacity, we will not attribute a discriminatory motive to the county's effective grant of a ten-year monopoly in this case.[19]

---

18. Section 3 of the Ordinance No. 6-1991 provides: "All Municipal Waste shall be transported to and delivered to the Facility designated by MCSWA from time to time. . . ."

19. Although we do not infer a discriminatory purpose from the length of the contractual period, we concede that this would be an easier case if the losers in the designation process were not precluded from the local market for ten years. Nevertheless, we cannot say, given the costs of constructing and

(Cont'd)

Appendix B

5. Economic Favoritism

The possibility still exists, however, that the county contracted for a tipping fee that was so high relative to the ten-year tipping fees (the rate that the parties would be willing to fix for the entire period) prevailing in the market at the time of contracting that it would suggest an attempt to confer some extraordinary, super-monopolistic profit on the chosen landfill operator. It is not clear whether, in addition to securing ten-year disposal capacity, the Act required the County to lock in a price as well. Regardless, we would not infer any discrimination from the County's desire to lock in the price unless it turns out that the price was unreasonable at the time the site was selected. Although the County appears to have made a "bad bet" on the price of long term waste disposal,[20] the market could just as easily have moved in the opposite direction and made county officials look financially savvy.[21] Indeed, the differential between the contracted tipping fee and the spot market is much smaller than it is in the *Harvey* case: the contractual tipping fee was $35 per ton relative to the spot rates of $17.20 at the American Waste Landfill or the $27.95 due at the Carbon Limestone Landfill.

(Cont'd)
operating environmentally sound facilities, that the ten-year period was unreasonable.

20. Spot market tipping fees, fees charged to dump waste today only, have declined precipitously since the County made its contract with the facility in Butler County. Spot rates currently are apparently approximately $17.50 — $30.00 per ton.

21. County officials apparently chose to lock in the tipping fee out of their concern that tipping fees would continue to escalate. See dist. ct. adjudication.

Appendix B

Appellees devote considerable effort to their attempts to demonstrate the less restrictive alternative means of ensuring long term environmentally safe waste disposal capacity. We do not pass on the efficacy of these alternative strategies. If the district court decides on remand that the Mercer County designation scheme has the effect of discriminating against out-of-state interests, it must then under the strict scrutiny standard address both the question whether the government interest is strong enough and whether less discriminatory means to achieve the same goal are available.

IV. CONCLUSION

For the foregoing reasons, we will vacate the orders of the district courts in these two cases, and remand for further proceedings consistent with this opinion. Parties to bear their own costs.

NYGAARD, *Circuit Judge*, dissenting.

In each of the two cases before us in this appeal, the majority reverses the district court and remands the cause for it to further scrutinize the designation process. I must respectfully dissent.

Discriminatory purpose *or* effect triggers heightened scrutiny. The outcome of a selection process, however open that process may be, can be discriminatory in its practical effect. Regardless of the designation process employed, in each case a designation was made in the context of a flow control scheme; in each case, that flow control designation constituted an impermissible discrimination against interstate commerce and by effect alone triggered heightened scrutiny. I would affirm the order in *Tri-County*, in which I conclude the district court

properly applied heightened scrutiny. I would reverse the order in *Harvey & Harvey*, and remand to the district court for it to apply the heightened scrutiny standard, because it failed to do so despite the discriminatory effect of the designation in the context of flow control.

The articles of commerce involved in these cases are both the waste itself and the disposal services it requires. "Solid waste, even if it has no value, is an article of commerce." *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359, 112 S.Ct. 2019, 2023, 119 L.Ed.2d 139 (1992). Although the Supreme Court in *Carbone* suggested that "the article of commerce is *not so much* the solid waste itself, but rather the service of processing and disposing of it," *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, __ U.S. __, __, 114 S.Ct. 1677, 1682, 128 L.Ed.2d 399 (1994) (emphasis supplied), the Court has not eliminated consideration of waste as an article of commerce. Whether dealings between Pennsylvania generators of waste and out-of-state waste disposal service companies are "viewed as 'sales' of garbage or 'purchases' of transportation and disposal services, the commercial transactions unquestionably have an interstate character." *Fort Gratiot*, 504 U.S. at 359, 112 S.Ct. at 2023.

In *Carbone* the Supreme Court held that a flow control ordinance coupled with a designation discriminated in its effect because it allowed only the designated operator to provide waste services within the geographic limits of the municipality. In *Carbone*, the town of Clarkstown designated a single, in-state facility to provide initial processing services for waste; its designation was part of a flow control scheme, which required all to use the designated facility. The court found that "[t]he ordinance thus deprives out-of-state businesses of access to a

local market." __ U.S. at __, 114 S.Ct. at 1681. Likewise, in the cases before us, under the ordinances, out-of-state providers of waste services cannot accept waste or sell services except to the extent that waste would be delivered to a designated facility; flow control mandates that waste only be delivered to a designated facility.

As in the *Carbone* case, "the real question is whether the flow control ordinance is valid despite its undoubted *effect* on interstate commerce." *Id.* __, 114 S.Ct. at 1682 (emphasis supplied).[1] And, again as in the *Carbone* case, "find[ing] that the ordinance discriminates against interstate commerce, we need not resort to the Pike test." *Id.*

Thus, heightened scrutiny must be applied in the cases before us, because, regardless of the process employed in selecting waste service providers, the effect discriminates against interstate commerce. The Supreme Court "interpret[s] the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or *destination* out of State." *Id.* (emphasis supplied).

Heightened scrutiny analysis dictates that "[d]iscrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, __ U.S. at __, 114 S.Ct. at 1683 (citing *Maine*

---

1. Significantly, the *Carbone* court did not engage in an analysis of the process by which the Clarkstown facility was selected. It looked only to effect.

v. Taylor, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986)).[2] The *Carbone* court specifically rejected the contentions of amici in that case that designation coupled with a flow control scheme fit into the narrow class of permissible discrimination. In *Carbone*, the amici "suggest[ed] that as landfill space diminishes and environmental cleanup costs escalate, measures like flow control become necessary to ensure the safe handling and proper treatment of solid waste. The teaching of our cases is that these arguments must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem." __ U.S. at __, 114 S.Ct. at 1683.

Although assurance of ten years of disposal capacity for county waste and the proper disposal of waste generated in a county are laudable goals, the designation of facilities under a flow control scheme may not be essential to achieving those goals. For example, the county might seek assurances of ten years of capacity from a few disposal facilities without then requiring all county-generated waste actually to be disposed of at those same specific facilities. The goal of providing ten years of disposal capacity need not require that each facility, to accept waste, must provide an assurance of ten years of capacity.[3] Like

---

2. Once "shown to discriminate against interstate commerce either on its face or in practical effect, the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Maine*, 477 U.S. at 138, 106 S.Ct. at 2447 (internal quotations and citation omitted).

3. To the extent that the county might be providing an exclusive franchise to accept waste as payment in exchange for the assurance of ten years of capacity, the scheme of flow control coupled with designation would in essence constitute a county scheme to finance the capacity assurance received,

(Cont'd)

the municipality in *Carbone*, the county in each of the cases before us has open to it "any number of nondiscriminatory alternatives for addressing the . . . problems alleged to justify the ordinance in question." *Id.*

As the holding of the Supreme Court in *Carbone* compels. The *Tri-County* district court applied the heightened scrutiny test upon finding that the Mercer County ordinance was discriminatory in its practical effect. The district court ruled in favor of Tri-County Industries, Inc., because the defendants failed to meet their burden of demonstrating the unavailability of nondiscriminatory alternatives. I would affirm the district court for the reasons stated in its well-reasoned opinion. The *Harvey & Harvey* district court overlooked the discriminatory effect of designation in a flow control scheme. For that reason, it failed to require heightened scrutiny. I would reverse its holding that *Pike* scrutiny applied, and remand. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970).

(Cont'd)
providing as payment the granting of a monopoly and its concomitant profits and stability in exchange for the assurance. The permissibility of such an arrangement is highly doubtful.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 12, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 93-592

TRI-COUNTY INDUSTRIES, INC.,

Plaintiff,

vs.

THE COUNTY OF MERCER, PENNSYLVANIA and THE MERCER COUNTY SOLID WASTE AUTHORITY,

Defendants,

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Defendant-Intervenor.

OPINION

Plaintiff, Tri-County Industries, Inc., a hauler of residential and commercial waste, filed this civil action on April 15, 1993, seeking a declaratory judgment that the Mercer County Solid Waste Management Plan, which was adopted as Ordinance No. 6-1991 by defendant Mercer County in response to the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101), 53 P.S. §§ 4000.101-4000.1904, violates the Commerce Clause. U.S. Const. Art. I, § 8, Cl. 3. Plaintiff also

seeks a permanent injunction, enjoining defendants Mercer County and The Mercer County Solid Waste Authority from revoking plaintiff's waste hauling license, prohibiting the transportation of waste out of the Commonwealth of Pennsylvania and enforcing the Mercer County Solid Waste Management Plan.

On April 29 and May 5, 1993, a hearing was held on plaintiff's motion for preliminary injunctive relief. At the conclusion of the hearing, the motion was denied based on the court's determination that plaintiff had failed to establish irreparable injury and the likelihood of success on the merits.[1] A pretrial order was entered on May 17, 1993.

On December 10, 1993, the parties filed a "JOINT MOTION TO ENTER JUDGMENT," requesting the court to decide the merits of this case based on the evidence admitted during the preliminary injunction hearing and the joint stipulation of facts which was attached to the motion. The motion was granted, and the parties were directed to file briefs in support of their respective positions. At this time, the briefs have been filed and the case is ripe for decision.

Findings of Fact

With respect to the court's findings of fact, the court adopts

---

1. On May 6, 1993, the court granted the motion of the Department of Environmental Resources (DER) for the Commonwealth of Pennsylvania to intervene. The DER is the Pennsylvania agency that is empowered to administer and enforce Act 101, and the rules promulgated thereunder by the Environmental Quality Board. Under the provisions of Act 101, each county in Pennsylvania must prepare and submit a Solid Waste Management Plan for the DER's approval.

the parties' jointly stipulated facts, which have been attached to this opinion as Exhibit A. The stipulated facts are based on the evidence submitted at the preliminary injunction hearing, including the exhibits offered by the parties and the testimony of witnesses.[2]

Conclusions of Law

Based on the findings of fact, the court makes the following conclusions of law:

It is well established that the hauling and disposal of solid waste involves commerce within the meaning of the Commerce Clause. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). *See also C & A Carbone, Inc. v. Clarkstown*, 511 U.S. __, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (The article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it). Moreover, Commerce Clause protection has been applied equally to restrictions on interstate commerce imposed by counties, as well as those imposed by states. *See, e.g., Waste Systems Corp. v. County of Martin, Minnesota*, 784 F.Supp. 641, 645 (D.Minn.1992), *aff'd*, 985 F.2d 1381 (8th Cir.1993).

Case law concerning Commerce Clause challenges yields two lines of analysis: first, whether the ordinance discriminates against interstate commerce, *Philadelphia, supra*, 437 U.S. at 624; and, second, whether the ordinance imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S.

2. The court notes that the stipulated facts are substantially similar to the findings of fact set forth in the court's May 25, 1993 adjudication, which denied plaintiff's motion for preliminary injunctive relief.

137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The purpose of the ordinance is not necessarily dispositive of whether the ordinance impermissibly discriminates against interstate commerce or incidentally burdens it. Where simple economic protectionism is effected by the ordinance, a virtually *per se* rule of invalidity has been applied. *Philadelphia, supra,* 437 U.S. at 624 (citations omitted). However, the absence of such a purpose does not establish the ordinance's validity because "the evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia, supra,* 437 U.S. at 626.[3]

In the present case, plaintiff asserts that Ordinance No. 6-1991 discriminates against interstate commerce on its face and in effect and that the ordinance places an excessive burden on interstate commerce. Based on the court's conclusion that Ordinance No. 6-1991 discriminates against interstate commerce, however, the court finds it unnecessary to engage in the *Pike* balancing test.

---

3. In each case relied upon by plaintiff during the preliminary injunction hearing, the immediate purpose and effect of the counties' regulations regarding the transportation of solid waste generated within their borders were to increase the respective counties' revenues. *See Waste Systems Corp. v. County of Martin, Minnesota,* 985 F.2d 1381 (8th Cir. 1993); *DeVito v. Rhode Island Solid Waste Mgt. Corp.,* 770 F.Supp. 775 (D.R.I.1991); and *Container Corp. of Carolina v. Mecklenburg County,* No. 3:92cv-154-MU (W.D.N.C.1992). The present case is distinguishable from these cases because Mercer County has no financial interest in the designated landfill or its owner. In fact, the landfill is located in a neighboring county. The absence of a protectionist purpose was the key factor in the court's conclusion after the preliminary injunction hearing that plaintiff had failed to establish its likelihood of success on the merits of its Commerce Clause claim. Upon further consideration, however, the court concludes that the lack of such a purpose does not necessarily preclude a finding that the ordinance unlawfully discriminates against interstate commerce.

Appendix C

In *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), the United States Supreme Court was presented with a Commeree Clause challenge to an Oklahoma statute that prohibited the shipping of natural minnows procured from waters within the State outside the State for sale. In holding that the statute was repugnant to the Commerce Clause, the Supreme Court engaged in the following inquiries: (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the ordinance serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.[4] Plaintiff has the burden of showing that the challenged ordinance discriminates against interstate commerce. If discrimination against interstate commerce is demonstrated, the burden shifts to defendants to justify the ordinance both in terms of the local benefits flowing from the ordinance and the unavailability of nondiscriminatory alternatives. *Hughes*, 441 U.S. at 336.

After consideration, the court concludes that Ordinance No. 6-1991 is not facially discriminatory. The ordinance does not

---

4. *See also Oregon Waste Systems, Inc. v. Dept. of Environ. Quality*, 511 U.S. ___, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (Because the surcharge is discriminatory, the virtually *per se* rule of invalidity — not the *Pike* balancing test — provides the proper legal standard for these cases. Thus, the surcharge must be invalidated unless respondents can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives); *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992) (Because the statute discriminates both on its face and in practical effect, the burden falls on Oklahoma to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake).

mandate that all municipal waste generated in Mercer County be transported to a designated facility within the county or the Commonwealth of Pennsylvania.[5] However, since the ordinance requires the disposal of Mercer County waste in designated facilities and the only facility that has been designated is in the Commonwealth of Pennsylvania, the practical effect of the ordinance is to discriminate against interstate commerce by precluding the transportation of Mercer County waste to out-of-state facilities.

Based on the determination that Ordinance No. 6-1991 discriminates against interstate commerce, the burden shifts to defendants to show first the local benefits flowing from the ordinance. Plaintiff does not dispute, and the court agrees, that Ordinance No. 6-1991 serves, *inter alia*, the following legitimate, local purposes: (1) to guarantee long-term landfill

---

5. In *Empire Sanitary Landfill, Inc. v. Commonwealth of Pennsylvania, Dept. of Environ. Resources*, __ Pa.Cmwlth.Ct. __, 645 A.2d 413 (1994), the Commonwealth Court of Pennsylvania was presented with a Commerce Clause challenge to a flow control ordinance that was virtually identical to Ordinance No. 6-1991. The Commonwealth Court also concluded that the flow control ordinance was not facially discriminatory. However, rather than determining whether the ordinance discriminated against interstate commerce *in effect* and shifting the burden to the defendant to establish that the ordinance served a legitimate local purpose which could not be promoted by nondiscriminatory alternatives, the court proceeded to analyze the validity of the ordinance under the *Pike* balancing test and ultimately concluded that the ordinance placed an unconstitutional burden on interstate commerce. With respect to the analysis employed by the Commonwealth Court, it has been noted that there is no clear line separating the categories of analyses in cases involving challenges to regulations under the Commerce Clause. *See, e.g., C & A Carbone, Inc. v. Clarkstown*, 511 U.S. __, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (J. O'Connor, concurring); *J. Filiberto Sanitation, Inc. v. State of New Jersey Dept. of Environ. Protection*, 857 F.2d 913, 919 (3d Cir.1988).

capacity; (2) to maximize recycling; (3) to bring Mercer County into compliance with state law; (4) to attain a fixed price for the disposal of Mercer County waste; and (5) to assure the environmentally sound disposal of Mercer County waste. Accordingly, defendants have met this burden of proof.

Next, defendants must establish the unavailability of nondiscriminatory alternatives which would serve the admittedly legitimate local purposes of the ordinance. In this regard, defendants claim that, in preparing the Request for Proposals, defendants Mercer County Solid Waste Authority researched many waste disposal alternatives, including an experimental process from Louisiana and a New Jersey process that reduced waste to a powdery substance. However, none of these technologies were approved as required by Act 101. Based on the advice of its consultant, defendants opted to designate a single landfill because it was alleged to be the most cost effective manner in which to assure the long-term and environmentally sound disposal of waste generated in Mercer County.[6]

While the possibility of escalating disposal costs is undoubtedly a legitimate legislative concern,[7] defendants have failed to establish that an absolute ban on the interstate shipment of Mercer County waste is necessary to deal with this concern.

---

6. Leslie E. Spaulding, the former Director of the Mercer County Regional Planning Commission, testified that the consulting engineer advised them to select a single disposal site to assure the best possible pricing and to avoid escalating disposal costs over the next ten years. (Tr. 4/29/93, pp. 80-82, Tr. 5/5/93, pp. 189, 198).

7. The United States Supreme Court has stated that it may be assumed that a State "has every right to protect its residents' pocketbooks as well as their environment." *Philadelphia*, 437 U.S. at 626.

Moreover, based on the evidence offered by plaintiff concerning the lower tipping fees charged by nearby Ohio landfills, it appears that the alternative chosen by defendants for the disposal of Mercer County waste may not be the most cost effective alternative for its residents.

In opposing plaintiff's motion for a permanent injunction, defendants assert that the manner in which the Northwest Sanitary Landfill was designated by the Authority was nondiscriminatory, and the court agrees with this assertion. The evidence established that the Request for Proposals process was conducted in an open, fair and competitive manner as required by Act 101. Although no out-of-state facilities ultimately bid on the contract, bids were solicited by the Mercer County Solid Waste Authority from across the country. Further, the same specifications applied to in-state facilities as well as out-of-state facilities. However, defendants' focus on the manner in which the Request For Proposals process was conducted is misplaced. It is the designation of a single, in-state landfill, rather than the process by which it was designated, that has resulted in the discrimination against interstate commerce.

In its Brief in Opposition to the Motion for Permanent Injunction, the DER makes the following argument:

* * *

> The mere fact that a county chooses to designate an in-state facility alone does not make out invidious discrimination. Indeed, the selection of one facility over another would occur independent of the actual location of the facility. Nor is it significant

> that Mercer County chose to designate only one facility. For example, if Mercer County had designated two landfills in a fair, open and competitive process, one in Pennsylvania and the other in New York, TCI would have suffered the same alleged "irreparable harm" it now claims.
>
> Under its claim of irreparable harm, TCI compares the rates at two Ohio landfills to the rate at Northwest Landfill and concludes that it is less expensive to haul waste to Ohio. But, what if Mercer had designated a landfill in the state of New York? Could TCI make out the same Commerce Clause claim? The answer of course is no. Even under Plaintiff's analysis, there would be no out-of-state discrimination. Moreover, the procedures and criteria used by the County were fair, open and competitive.
>
> * * *

(DER Brief in Opposition, pp. 14-15).

Contrary to the DER's assertion, the court concludes that the designation of a single, in-state landfill is significant. If defendants had designated two landfills pursuant to Ordinance No. 6-1991 — one in Pennsylvania and one in New York — plaintiff may still have a valid Commerce Clause claim. The designation of one in-state and one out-of-state landfill would preclude a finding that the ordinance discriminates on its face or in effect. However, that would not end the court's inquiry.

Appendix C

Rather, the court would engage in the *Pike* balancing test and determine whether the burden imposed on interstate commerce by the designation of the two landfills is excessive in relation to the putative local benefits.

In summary, the court concludes that defendants have failed to meet their burden of establishing the unavailability of nondiscriminatory alternatives. Accordingly, plaintiff is entitled to a declaratory judgment that Ordinance No. 6-1991 violates the Commerce Clause. Further, plaintiff's request for a permanent injunction will be granted.

An order follows.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 93-592

TRI-COUNTY INDUSTRIES, INC.,

Plaintiff,

vs.

THE COUNTY OF MERCER, PENNSYLVANIA and THE MERCER COUNTY SOLID WASTE AUTHORITY,

Defendants,

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Defendant-Intervenor.

ORDER

AND NOW, this 12th day of October, 1994, in accordance with the foregoing opinion, it is hereby ORDERED that judgment be declared in favor of plaintiff, Tri-County Industries, Inc., and against defendants, The County of Mercer and The Mercer County Solid Waste Authority and defendant-intervenor, Commonwealth of Pennsylvania, Department of Environmental Resources, that the Mercer County Solid Waste Management Plan, which was adopted by defendant Mercer County as Ordinance No. 6-1991, is invalid under the Commerce Clause of the United States Constitution. It is further ORDERED that defendants, The County of Mercer and The Mercer County Solid Waste Authority, are enjoined from revoking plaintiff's waste

hauling license, prohibiting the transportation of Mercer County waste out of the Commonwealth of Pennsylvania and enforcing Ordinance No. 6-1991. The Clerk shall mark the above-captioned civil action closed.

s/ William L. Standish
William L. Standish
United States District Judge

cc: Thomas May, Esq.
Dillon, McCandless & King
128 West Cunningham Street
Butler, PA 16001

Ronald Amrhein, Jr., Esq.
William J. Madden, P.C.
165 Euclid Avenue
P.O. Box 981
Sharon, PA 16146

David A. Gallogly, Esq.
Office of Chief Counsel
Dept. of Environmental Resources
Crawford County Industrial Park
R.D. #2, Box 614
Meadville, PA 16335

(2)

No. 95-1127

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TRI-COUNTY INDUSTRIES, INC.,

Petitioner,

vs.

COUNTY OF MERCER, PENNSYLVANIA; MERCER COUNTY SOLID WASTE AUTHORITY; AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL A. TUFANO
(Counsel of Record)
General Counsel
Office of General Counsel
Commonwealth of Pennsylvania
225 Main Capitol
Harrisburg, PA 17120
(717) 787-2551

DENNIS W. STRAIN
GAIL B. PHELPS
MICHAEL D. BUCHWACH
KRISTEN M. CAMPFIELD
Office of Chief Counsel
Department of Environmental Protection
P.O. Box 8464
Harrisburg, PA 17105-8464
(717) 787-7060

Counsel for the Commonwealth of Pennsylvania, Department of Environmental Protection, Respondent

WILLIAM J. MADDEN, P.C.
165 Euclid Avenue
P.O. Box 981
Sharon, PA 16146
(412) 342-1300

Counsel for the Mercer County Solid Waste Authority and the County of Mercer, Respondents

10 pp

QUESTION PRESENTED

Should a court, in analyzing whether a waste flow control ordinance discriminated in purpose or effect under the dormant Commerce Clause, consider the facility selection process, the duration of the resulting facility designation, and the likelihood of amendment of the designation?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ..... iii, iv

COUNTER-STATEMENT OF THE CASE 1

A. Pennsylvania's Municipal Waste Planning, Recycling and Waste Reduction Act and Mercer County Ordinance No. 6-1991 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE THIRD CIRCUIT'S DECISION IN *HARVEY* IS CONSISTENT WITH THIS COURT'S DECISION IN *C&A CARBONE* 4

II. THE THIRD CIRCUIT'S DECISION IN *HARVEY* IS CONSISTENT WITH THE SECOND CIRCUIT'S DECISION IN *SSC CORP. v. TOWN OF SMITHTOWN*, 66 F.3d 502 (2d Cir. 1995) 9

CONCLUSION 11

TABLE OF AUTHORITIES

Case **Page**

Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 48 F.3d 701 (3d Cir. 1995)..... 7

C&A Carbone, Inc. v. Town of Clarkstown, __ U.S. __, 114 S.Ct. 1677 (1994)..... 3-6, 8-10

Exxon Corp. v. Maryland, 437 U.S. 117 (1978)..... 8

Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995)..... 1-7, 9, 10

SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995)..... 3, 9, 10

West Lynn Creamery, Inc. v. Healy, __ U.S. __, 114 S.Ct. 2205 (1994)..... 8

Statutes

Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 2988, P.L. 566, 53 P.S. §§4000.101 - 4000.1904..... 1, 2

Pennsylvania Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §§1340.101 *et seq*..... 1

Regulations **Page**

25 Pa. Code §272.251 2

25 Pa. Code §272.252 2

Respondents Commonwealth of Pennsylvania, Department of Environmental Protection ("the Department")[1], Mercer County Solid Waste Authority and the County of Mercer hereby oppose the Petition for Writ of Certiorari filed by Tri-County Industries, Inc.

COUNTER-STATEMENT OF THE CASE

A. Pennsylvania's Municipal Waste Planning, Recycling and Waste Reduction Act and Mercer County Ordinance No. 6-1991.

Respondents deem the following information necessary to correct omissions in Part A of Petitioner's Statement of the Case:

Pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, §§4000.101 - 4000.1904 ("the Act"), facilities selected by a Pennsylvania county to provide the county with ten years of processing and disposal capacity do not have to be located within the county. *Harvey & Harvey, Inc. v. County of Chester,* 68 F.3d 788, 793 (3d Cir. 1995). Each county must consider alternative facilities, and "provide reasonable assurances that the county utilized a fair, open and competitive process for selecting such facilities . . . from among the alternatives which were suggested to the county." *Id.*, citing 53 P.S. §4000.502(f)(2). The ten year planning term required by the Act is required by §4000.502(f) in addition to the sections cited by Petitioner.

---

[1] The Department was formerly named the Department of Environmental Resources ("DER"), and was sued under that name in this litigation. However, under the Pennsylvania Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §§1340.101 *et seq.*, the Pennsylvania General Assembly split DER into two agencies: the Department of Environmental Protection and the Department of Conservation and Natural Resources.

The facilities selected by a Pennsylvania county, and the process by which they were selected, must be set out in the county's municipal waste management plan. *Harvey*, 68 F.3d at 793, citing 53 P.S. §4000.502(f). If a county chooses to require that municipal waste be disposed of at a designated facility by means of an ordinance, the plan must include a copy of the proposed ordinance. 68 F.3d at 793, citing 53 P.S. §4000.502(l).

After a county-wide public process of ratification and adoption of the plan, the county submits the plan to the Department for review. 68 F.3d at 793, citing 53 P.S. §§4000.503(d); 504(c). If the plan is approved, it must be implemented. 53 P.S. §4000.303(a)(2); 501(a). Thereafter, the plan and the list of facilities designated by the county for processing and disposal may be revised by the county at any time but must be revised at least three years prior to the time that the remaining capacity for a county is exhausted. 68 F.3d at 793, citing 25 Pa. Code §272.251(b); 25 Pa. Code §272.251(a)(1). Addition or deletion of a facility to or from the plan requires the full "fair, open and competitive" selection process. 53 P.S. §4000.501; 25 Pa. Code §272.252.

Based on the advice of its consultant, Mercer County concluded that the best solution for this fairly small county would be to contract with a single disposal facility. 68 F.3d at 795. The county advertised its request for proposals ("RFP") nationwide. *Id.* at 795, 808. Although many of the 23 companies that obtained the RFP were located in Pennsylvania, others were located in Ohio, New York, Maryland, New Jersey, Minnesota and Louisiana. *Id.* at 795, 808.

Mercer County's RFP requirements applied equally to all disposal facilities, irrespective of their location. *Id.* at 795, 808. Mercer County selected the successful bidder from among the competitors. *Id.* at 795.

Mercer County's ordinance requires each hauler in the county to obtain a license and to haul municipal waste generated in the county to the landfill designated in the county plan, as it may be revised from time to time. *Id.* The ordinance, itself, does not identify a specific landfill.

SUMMARY OF ARGUMENT

The three-part test articulated by the United States Court of Appeals for the Third Circuit in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995) is consistent with the recent Supreme Court decision in *C&A Carbone, Inc. v. Town of Clarkstown*, __ U.S. __, 114 S.Ct. 1677 (1994), and with the Second Circuit decision in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995). There are, therefore, no grounds upon which this Court should grant *certiorari*.

The three-part test is designed to assist courts in determining whether an ordinance discriminates in purpose or effect -- the test reiterated by this Court in *C&A Carbone*. The test takes into account, most importantly, that some waste facility designations are made pursuant to selection processes, which may or may not be discriminatory. A selection process that allows equal access to in-state and out-of-state competitors, for instance, and which is not otherwise discriminatory in purpose or effect, would be constitutional. Petitioner argues that the mere designation of a single facility in an ordinance is invariably discriminatory. Such a conclusion is contrary to this Court's dormant Commerce Clause jurisprudence.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION IN *HARVEY* IS CONSISTENT WITH THIS COURT'S DECISION IN *C&A CARBONE*.

Contrary to Petitioner's assertions, *Harvey* does not conflict with *C&A Carbone*. As in *C&A Carbone*, the Third Circuit analyzed whether a local waste flow control ordinance discriminated against out-of-state competitors. In *C&A Carbone*, this Court invalidated the Clarkstown, New York, facility designation because it favored local enterprise by prohibiting competition from out-of-state firms. 114 S.Ct. at 1684. Factually unlike *C&A Carbone*, however, *Harvey* involved a facially fair, open and competitive facility selection process which was nationally advertised and available on equal terms to any bidder. *Harvey*, 68 F.3d at 808. Looking only at the end result of such a competitive process, i.e., the selection of a single, in-state facility, would be an inadequate analysis of the Constitutional question, given the extensive amount of competition that was allowed to occur. The Third Circuit recognized this, and developed a three-part test which takes into account competition at the selection stage, as well as duration of the designation of the successful competitor and ease of amendment of the ordinance. This test is to be applied, consistent with this Court's Commerce Clause jurisprudence, in determining whether an ordinance discriminates in purpose or effect.

This Court demonstrated in *C&A Carbone* that fair competition is at the core of dormant Commerce Clause jurisprudence. *C&A Carbone*, 114 S.Ct. at 1680, 1683. In that case, the town of Clarkstown, New York, designated a waste

processing facility in which it had a financial interest[2] as the only facility at which municipal waste in the town could be processed prior to disposal. The town "favored" this facility, and used the flow control ordinance to give it "an advantage over rival businesses from out of State." 114 S.Ct. at 1684. Focusing on the absence of competition, this Court said:

> The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Id. at 1683. Consequently, this Court found Clarkstown's ordinance to be discriminatory in "design and effect." *Id.*

Unlike the facts in *C&A Carbone*, the facts behind Mercer County's ordinance establish that the facility selection process promoted competition. Mercer County's Solid Waste Authority advertised nationally for bids for disposal service with a request for proposals. *Harvey*, 68 F.3d at 795, 808. The RFP requirements "applied equally to all disposal facilities, irrespective of their

---

[2] Pursuant to a consent decree with the New York State Department of Environmental Conservation, Clarkstown agreed in 1989 to close its landfill and build a new solid waste transfer station on the same site. 114 S.Ct. at 1680. Clarkstown entered into a contract with a local private contractor who agreed to construct the facility and operate it for five years, after which the town would buy it for one dollar. *Id.* Until the town took ownership, the town guaranteed a minimum waste flow of 120,000 tons per year, for which the contractor could charge haulers a "tipping" fee of $81 per ton. *Id.* If the station received less than 120,000 tons in a year, the town promised to make up the tipping fee deficit. *Id.*

location." *Id.* The facility ultimately selected[3] was not in the county and had no financial relationship with the county (aside from a "relatively small" $1.00 a ton fee on waste disposed). *Id.* at 808.

In addressing whether the ordinance discriminated in purpose or effect, the Third Circuit pointed to the competitive selection process. The Court said:

> In operating its Plan, Mercer County made a significant attempt to open its designation process to out-of-state sites.

Id. Since this Court has not decided a waste flow control case in which there was such competition, the Third Circuit fashioned a three-part test to direct the District Court in analyzing the ordinance on remand.

The test looks at the designation process, the duration of the designation, and the likelihood of an amendment to add alternative sites. *Harvey*, 68 F.3d at 801. The test is designed to help ascertain whether "out-of-state bidders do not in practice enjoy equal access to the local market." *Id.* The test does not conflict with, nor replace, the "purpose or effect" test reiterated by this Court in *C&A Carbone*. It is, in fact, relevant to both prongs of the "purpose or effect" test. As the Third Circuit emphasized, "a plaintiff challenging a designation scheme like the one at issue here must show that the designation process favors, either purposely or in effect, in-state sites." *Id.* at 802.

---

[3]Petitioner submitted a bid in response to the RFP, but was not selected. (*Petition, Statement of the Case*, p. 3.)

Nine months prior to issuing its decision in *Harvey*, the Third Circuit addressed New Jersey's regulatory selection process in the case of *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995). Contrary to Petitioner's contentions, the Third Circuit in *Harvey* accurately characterized its own legal analysis in *Atlantic Coast*, and issued a consistent decision. The Third Circuit recognized in both cases that a law may be discriminatory in purpose or effect. *Harvey*, 68 F.3d at 802; *Atlantic Coast*, 48 F.3d at 710, 717. In *Atlantic Coast*, because the Third Circuit found that the New Jersey selection process emphatically favored in-state facilities over out-of-state facilities, the Third Circuit found the regulations to be discriminatory and remanded the case to the District Court for further proceedings. 48 F.3d at 718.

Petitioner misconstrues *Atlantic Coast* as having found New Jersey's regulations discriminatory regardless of the selection process. New Jersey's regulations, however, *defined* the selection process. The regulations instructed counties and waste districts to select and designate facilities, and to give a strong advantage in the selection process to in-state facilities. This is what the Third Circuit found objectionable. The Third Circuit made this clear, in a phrase *omitted* by Petitioner in its rendering to this Court:

> More specifically, New Jersey is regulating the market for solid waste processing and disposal services in each of the districts by directing district consumers of those services to utilize a favored service provider who, ***in the absence of exceptional circumstances***, operates a local facility.

48 F.3d at 713 (Emphasis added to show deletion by Petitioner). The court was analyzing the entire process, and not merely the end result. The process is significant when it allows for competition.

Finally, Petitioner puts misplaced importance on the selection of a *single* disposal facility. Petitioner wrongly asserts that *C&A Carbone* compels finding the Mercer County ordinance discriminatory because the ordinance designates a "single" disposal facility.[4] *Petition*, p. 8. It was not the number of facilities in *C&A Carbone* that determined whether there was discrimination, rather, it was whether "investment from outside", or "access to a local market", had been impermissibly interfered with, or "squelched". 114 S.Ct. at 1680, 1683.[5]

This Court found the ordinance in *C&A Carbone* discriminatory because the ordinance, in its design and effect, deprived competitors, including out-of-state firms, of access to a local market. 114 S.Ct. at 1680, 1684. To interpret *C&A Carbone* as holding that the number of facilities selected for waste disposal services is determinative of a Commerce Clause violation would vitiate this Court's "sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, __ U.S. __, 114 S.Ct. 2205, 2215 (1994). As this Court recently noted, Commerce Clause jurisprudence "is not so rigid as to be controlled by the form" of the alleged barrier to commerce. *Id.*

If Commerce Clause jurisprudence were that rigid, then every selection process would be discriminatory, no matter how fair, no matter how open, no matter how competitive the process had been. The Commerce Clause does not, as Petitioner argues, prohibit a competitive selection process; and unsuccessful bidders,

---

[4] The designation actually occurred in the Mercer County municipal waste plan, not in the ordinance.

[5] This Court has also said: "the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978).

like the Petitioner, cannot make out a violation of the Commerce Clause merely because someone else won the bid. A fair, open and competitive selection process will always result in some bidders being selected, and some being rejected. The losing bidders, however, have not been denied access to the local market as long as the selection process was fair, open and competitive.

In establishing its three part test, the Third Circuit recognized that a selection process which was fair, open and competitive on its face, might nonetheless have a discriminatory purpose or effect. As a result, it remanded the case so that the district court could make the findings needed to implement this Court's standard established in *C&A Carbone*.

II. THE THIRD CIRCUIT'S DECISION IN *HARVEY* IS CONSISTENT WITH THE SECOND CIRCUIT'S DECISION IN *SSC CORP. v. TOWN OF SMITHTOWN*, 66 F.3d 502 (2d Cir. 1995).

Petitioner argues that *Harvey* conflicts with the Second Circuit's decision in *SSC Corp.* because the Third Circuit developed a three-part test which the Second Circuit did not. There is, however, no conflict. The three-part test is appropriate to analyze an ordinance when the ordinance implements a competitive selection process, and such a process did not exist in *SSC Corp.*

Once again, the existence or absence of competition is pivotal. There is no evidence in *SSC Corp.* of the ordinance implementing a competitive selection process. In *SSC Corp.*, Smithtown, New York, developed an ordinance in response to a shortage of landfill space by arranging with the neighboring town of Huntington for the construction of a garbage incinerator. The incinerator was to be owned and operated by a private company, but financed by the towns. 66 F.3d at 505. To ensure a steady flow of waste to the Huntington incinerator, and thus to ensure a steady flow of tipping fees, Smithtown passed a flow control

ordinance requiring all residential and commercial waste to be disposed at the incinerator. *Id.* at 507. Smithtown then entered into contracts with private haulers to collect the waste. *Id.* at 505. The contracts required the haulers to deliver the waste to the incinerator.[6] *Id.*

The ordinance provided that haulers could dispose of the town's waste only at a solid waste facility designated by the town board. Separately, the town designated the incinerator. As in *C&A Carbone*, there is no indication of any competitive process required by the State of New York or utilized by the town to select the incinerator. The Second Circuit found the ordinance to be "indistinguishable" from Clarkstown's, and therefore affirmed the District Court's invalidation of the ordinance. *Id.* at 518.

In contrast, Mercer County's ordinance was based on competition -- significant competition -- and nothing on its face prevented competition or a fair result. The ordinance implements the county's waste management plan, which was designed to assure capacity through a fair, open and competitive selection process. The fair, open and competitive selection process makes the Mercer County ordinance different from that involved in *SSC Corp.*, just as it made it different from that involved in *C&A Carbone*.

The facts of *Harvey* called for the development of the Third Circuit's three-part test because of the existence of the competitive selection process. The facts in *SSC Corp.* did not call for such a test because there was no selection process. The *Harvey* decision, therefore, does not conflict with *SSC Corp.*

---

[6] The Second Circuit upheld the collection contracts under the market participant theory, reversing the District Court.

CONCLUSION

For the foregoing reasons, Respondents Commonwealth of Pennsylvania, Department of Environmental Protection, Mercer County Solid Waste Authority, and the County of Mercer respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

PAUL A. TUFANO
(Counsel of Record)
General Counsel
Office of General Counsel
Commonwealth of Pennsylvania
225 Main Capitol
Harrisburg, PA 17120
(717) 787-2551

DENNIS W. STRAIN
GAIL B. PHELP
MICHAEL D. BUCHWACH
KRISTEN M. CAMPFIELD
Office of Chief Counsel
Department of Environmental Protection
P.O. Box 8464
Harrisburg, PA 17105-8464
(717) 787-7060

Counsel for the Commonwealth of Pennsylvania, Department of Environmental Protection, Respondent

WILLIAM J. MADDEN, P.C.
165 Euclid Avenue
P.O. Box 981
Sharon, PA 16146
(412) 342-1300

Counsel for the Mercer County Solid Waste Authority and the County of Mercer, Respondents